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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH, ... Petitioner

VS.

KENTUCKY STATE
BAR ASSOCIATION, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Robert Allen Sedler
Box 862
University Station
Lexington, Kentucky 40506
Attorney for Petitioner

PROFESSIONAL PRINTING CO., 1113 Commercial Dr., Lexington, Ky. 40505 - 252-9662

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BAR ASSOCIATION, ... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Court of Appeals of Kentucky entered in the above-titled case on February 2, 1973, petition for rehearing denied on May 4, 1973.

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix, *infra*, pp. 1a-5a.

JURISDICTION

The judgment of the Court of Appeals of Kentucky was entered on February 2, 1973. A petition for rehearing was denied May 4, 1973. On May 22, 1973, the execution of the Mandate was stayed to

August 20, 1973, to enable the Petitioner to seek review of the decision in this Court. (Appendix, *infra*, p. 7a) The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISION, STATUTE, AND RULES INVOLVED

United States Constitution, Amendment XIV

". . . nor shall any State deprive any person of life, liberty or property, without due process of law . . ."

Kentucky Revised Statutes 431.065

"(1) An attempt to commit any offense under the law of the Commonwealth, if not otherwise specifically provided for, is punishable by imprisonment in jail not to exceed twelve months or by a fine not exceeding $5,000.00, or both.

(2) No attempt shall be punishable by fine or term of imprisonment in jail exceeding that which is provided for the consummated offense."

Rules of the Court of Appeals of Kentucky

The Rules of the Court of Appeals of Kentucky applicable to disciplinary proceedings are Rules 3.130 to 3.460.* Because the provision are lengthy, they are set forth in the Appendix, *infra*, pp. 8a-23a.

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* The rules set out are the rules that were in effect during the time of the disciplinary proceedings brought against the petitioner on March 29, 1971. Effective July 1, 1971, amendments to the rules were promulgated by the Court of Appeals and the rules were renumbered.

QUESTIONS PRESENTED

1. Whether in bar disciplinary proceedings, the highest state court, which makes the final determination as to guilt and punishment, can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge against her and as to which she had no notice that she would be charged?

2. In bar disciplinary proceedings, where the finding of guilt as to the underlying offense that formed the basis of the original charge and as to the additional offenses that formed the basis of the attorney's disbarment depended on the resolution of an issue of credibility, whether the administrative agency conducting the proceedings in the first instance or the reviewing court can, consistent with due process of law, rely substantially on evidence presented in a grand jury proceeding to resolve that issue adversely to the attorney?

3. Where the rules of the highest state court governing bar disciplinary proceedings prohibit the use of testimony presented before a grand jury in such proceedings, whether in a particular case grand jury testimony can be used to determine important issues adversely to the attorney if the attorney does not object to such use?

4. Where an attorney is issued a show cause order by the highest state court to show cause why the recommended punishment of six months' suspension should not be imposed, whether the highest state court, which makes the final determination as to punishment,

can, consistent with due process, enter an order disbarring the attorney?

STATEMENT OF THE CASE

The petitioner, an attorney, seeks review of the judgment of the Court of Appeals of Kentucky entered on February 2, 1973, permanently disbarring her from the practice of law in that state, and contends that the manner in which the disciplinary proceedings were conducted resulted in multiple violations of her due process rights.

Petitioner was admitted to the Kentucky Bar in September, 1967. In February, 1968, petitioner moved to Perry County, a small rural county in southeastern Kentucky, with her husband and two-month old son. She set up practice on her own in April, 1968, and was the only woman lawyer in the county and one of two women attorneys in a thirteen-county area of Appalachian Kentucky. Her practice consisted of representing women in divorce actions and other cases and in serving as court-appointed counsel in criminal matters. Petitioner practiced there until December, 1969. In February, 1970, the Perry County Grand Jury returned three indictments against the Petitioner, charging her with obtaining money under false pretenses, forgery, and removal of court records. Following the indictments the petitioner returned to Perry County and retained counsel.

The events that formed the basis of these charges arose out of petitioner's representation of Mrs. Sally

Fugate in Perry County, Kentucky, in 1968 and 1969. Sally Fugate was the mother of Everett Fugate, who died intestate without issue, leaving as his heirs his mother and his wife, Odessa Fugate Jones. One of the assets of the estate was a house and lot to which the mother desired to acquire title. The petitioner represented Sally Fugate in the settlement of the decedent's estate, and in that connection, in April, 1969, filed a suit against Odessa Fugate Jones, the administratrix. In August, 1969, Sally Fugate told the petitioner that she and Odessa Fugate Jones had agreed on a settlement of the litigation as a part of which Mrs. Jones would deed the house and lot in question to Mrs. Fugate. At Mrs. Fugate's request the petitioner prepared the deed. The petitioner advised Mrs. Fugate that the sale would have to be approved by the Circuit Judge in light of the pending suit, and Mrs. Fugate told the petitioner that she would take the deed to Mrs. Jones to sign and then have it signed by the Circuit Judge and file it. Petitioner subsequently filed an accounting of the estate with the Circuit Court and assumed that the matter was closed. A copy of the accounting was furnished to the Trial Committee and made a part of the record in the case. Petitioner did not hear from Mrs. Fugate subsequently. (Appendix, *infra*, p. 55a)

On the date of trial, May 14, 1970, the state's attorney offered to dismiss all of the charges and to permit petitioner to plead to an amended charge of attempt to commit an offense under the laws of the state of Kentucky, a misdemeanor, Kentucky Revised Sta-

tutes 431.065, supra, with promise of the state's recommendation of a twelve months' probated sentence. On the advice of counsel, a senior member of the Perry County Bar, and petitioner's own assessment of her chances of prevailing before the jury, she entered a plea to the amended charge and received the probated sentence.[1]

After these events the petitioner returned to Bowling Green, Kentucky, where it was discovered in July, 1970, that her husband was suffering from a severe pituitary tumor, which resulted in his death in August, 1970. No disciplinary proceedings were initiated against the petitioner following her plea of guilty. However, on March 29, 1971, the Kentucky State Bar Association did institute disciplinary proceedings, charging that the petitioner had pleaded guilty to attempting to commit an offense under the laws of Kentucky, and that such action constituted unethical and unprofessional conduct on her part. (App., *infra*, p. 24a) The petitioner was not charged with having obtained money under false pretenses from a client, or with forgery or with removal of court records.

Petitioner's response to the charge filed by the Bar Association was that she did not commit that offense to which she pleaded. It was her theory that her husband who was at that time suffering from the tumor which subsequently resulted in his death, had forged a check from Mrs. Sally Fugate to the petitioner

1. The Court of Appeals failed to indicate in its opinion that the sentence had been probated.

as escrow agent in the amount of $632.72, forged the petitioner's endorsement on the check, and cashed the check, retaining the proceeds himself. The proceeds of the check were purportedly to be turned over to Odessa Fugate Jones in settlement for the transfer of the house and lot belonging to Everett Fugate. In addition, it appeared that a deed transferring the house and lot, which, according to the petitioner, was not the deed that she had prepared, had been filed in the Perry County Court Clerk's Office with the forged signature of the Perry Circuit Judge affixed to it.[2] It had subsequently been removed from the records. The indictments against the petitioner charged her with having committed these offenses.

The motivation for this seemingly bizarre behavior by the petitioner's husband was, in her view, related to the fact he was suffering a personality displacement caused by the then unknown severe pituitary tumor. He believed that the petitioner was going to

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2. The petitioner testified before the Trial Committe that she did not prepare the deed that was filed in the County Court Clerk's office and introduced into evidence a copy of the deed that she had prepared. (App., *infra*, p. 52a) The deed that the petitioner prepared had spaces for the signatures of Sally Fugate and Odessa Fugate Jones and recited that the petitioner prepared the deed. It also had a space for the approval of the Circuit Judge. The deed that was filed by Mrs. Fugate was signed only by the Circuit Judge (the signature was forged) and not by the parties. The Trial Committee made no findings with respect to the preparation of the deed, but the Court of Appeals stated that the deed prepared by the petitioner was the one that was filed in the County Clerk's office (App., *infra*, p. 2a).

commit him to a mental hospital, divorce him and forget about him, and thus as a last ditch effort, he decided upon this scheme to irreparably damage her ability to earn a livelihood and support herself and their son. In December, 1968, Mr. Smith was discharged by his employer, R. J. Reynolds Tobacco Company for misappropriation of company funds, and since that time he had been very hostile to the petitioner and their son. From December, 1968, until the date of his death in August, 1970, he gained approximately fifty pounds, did not work, slept between fourteen and sixteen hours a day, and became extremely jealous of her and their young son. He would also disappear for days at a time and gave insufficient fund checks to various local businessmen, which petitioner covered. She detailed other acts of bizarre behavior on his part and testified that after she was indicted, he said to her: "I fixed you, you won't practice law much longer in the State of Kentucky. Tell me what prison they send women to in Kentucky — Eddyville or LaGrange." (App., *infra*, p. 47a) The petitioner supported her theory of her husband's involvement with a detailed statement of his behavior during this time period. The petitioner also provided the Trial Committee with the following evidence in support of her contention: (1) her husband had cashed checks made to her before by endorsing them in her name, and she provided the Trial Committee with an example of such check and his writing of her signature, (2) the check was negotiated at her husband's bank, Citizens State, while Petitioner did all of her banking with People's Bank, the other bank

in Hazard, Perry County, Kentucky, (3) that the bank teller did not recall her tendering the check for cashing. (App., *infra*, p. 28a)

At the hearing before the Trial Committee, both the Bar Association and the Petitioner, as well as the Trial Committee, proceeded on the assumption that the only issue was the petitioner's plea in mitigation, i.e., that she did not prepare and cash a check from Sally Fugate in the amount of $632.72. There was no inquiry by the Committee as to whether the petitioner was the person who forged the Circuit Judge's name on a deed or the one who removed the deed from the Clerk's office. It should also be noted that throughout these proceedings the Bar Association was insisting that the Trial Committee could not go behind the plea of guilty even in mitigation.

The Trial Committee did not call Mrs. Fugate as a witness, although the petitioner testified that Mrs. Fugate was living in Perry County and that she had not talked with the petitioner about the check in question. (App., *infra*, p. 28a) The petitioner, who was representing herself before the Trial Committee, candidly informed the Committee that Mrs. Fugate had testified before the Perry County Grand Jury, which was investigating the removal of the deed from the files and the forgery of the Judge's signature, to the effect that the petitioner was the person who had prepared the check and that the petitioner was to remit the proceeds to Mrs. Jones. However, Mrs. Fugate did not testify before the Grand Jury that she ever discussed this matter with the petitioner or demanded

an explanation as to why the proceeds had not been turned over to Mrs. Jones. The petitioner had in her possession a copy of the grand jury proceedings, which was turned over to the Trial Committee and made a part of the record. (App., *infra*, p. 62a)

The petitioner also informed the Committee that she employed a handwriting expert, Maxwell Allen, to look at the check in question to determine whether it was her handwriting. He made a report to her attorney, and it was her recollection that he said that he could not make such a determination. The Committee called Mr. Allen as a witness, and he testified that his statement to her attorney was that "purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the check." (App., *infra*, p. 64a) No effort was made by the Trial Committee to compare the purported signature of the petitioner on the check with the signature on the check admittedly signed in her name by her late husband, which she had furnished to the Committee.

The Trial Committee issued its Report on May 23, 1972. It found that the petitioner had prepared and cashed the check in question and that no part of the proceeds had been paid over to Mrs. Jones. It made no findings with regard to the forgery of the Circuit Judge's signature or the removal of the deed from the Clerk's office, since these matters were not in issue, and there was nothing, even in the transcript of the grand jury proceedings, that connected petitioner with either of those acts. The Trial Committee stated that it was considering "mitigating circum-

stances" and recommended a three-year suspension. (App., *infra*, p. 39a)

The Board of Governors received the Trial Committee's findings and entered its order on July 14, 1972. It considered the mitigating circumstances of (1) petitioner's inexperience as an attorney, (2) the physical infirmity of her husband, James Allen Smith, during said period, which resulted in his death, (3) consideration of the fact that Respondent now has the responsibility of rearing and educating the infant son of her marriage, (4) having made full restitution to her client, Sally Fugate, and (5) her previous good character and conduct, both as an individual and attorney." (Appendix, *infra*, p. 39a). The Board found that the petitioner was "guilty as charged of unprofessional conduct" and recommended a six months' suspension from the practice of law.

The Court of Appeals then issued a rule on July 21, 1972, directing the petitioner to "show cause why the recommendation of the Board should not be enforced by appropriate orders of the Court." (App., *infra*, p. 43a) Petitioner duly filed a response to the show cause order, and after briefing, the Court of Appeals entered its judgment on February 2, 1973. It found that the petitioner was guilty of "multiple offenses" and had also committed perjury "in her attempt to extricate herself from these charges." (App., *infra*, pp. 3a-4a) It stated that three crimes had been committed: the obtaining of money under false pretenses, the forgery of the Circuit Judge's signature, and the removal of the deed from the Clerk's Office (App., *infra*, pp. 2a-3a)

and found that the petitioner was guilty of these three offenses, **notwithstanding that the petitioner had not entered a plea as to any of these offenses — indeed they had all been dismissed — and that she had not been charged with committing any of these offenses by the Bar Association.** In addition it added another new charge, that of perjury, which would necessarily be based on the conflict between the petitioner's testimony before the trial committee and the witness testimony that was contained in the Perry County Grand Jury Record, **despite the fact that the petitioner never had the opportunity to confront or cross-examine the witnesses who testified before the Grand Jury and that these witnesses were also not examined by the Trial Committee.** It concluded that: "The offenses are multiple; they are too serious in nature and reflect a degree of dishonesty totally abhorrent to all principles enunciated in the code of ethics of the legal profession." It then ordered that the petitioner be permanently disbarred from the practice of law in Kentucky. (App., *infra*, p. 5a).

Petitioner filed a Petition for Rehearing, arguing multiple violations of her due process rights in the disciplinary proceedings in that (1) the Court of Appeals found that the petitioner had committed "multiple offenses" when the charge accused her of committing but one offense, and she had not been charged with committing any of the offenses of which she was found guilty; (2) Consideration by the Court of Appeals of Kentucky of a transcript of proceedings before the Grand Jury of Perry County, at which neither

the Petitioner nor her counsel was present, denied Petitioner the rights of cross-examination and confrontation of witnesses against her, in violation of due process of law under the 14th and 6th Amendments to the federal constitution and under the Rules of the Court of Appeals as to disciplinary proceedings, (3) The finding of perjury by the Court of Appeals was a finding by the Court of professional misconduct, which was not a subject of any pending charge against her, and denied her due process of law by failing to give her adequate notice of such charge and a hearing on such charge and (4) The judgment of permanent disbarment was a denial of due process of law, since the petitioner was only ordered to show cause why she should not be suspended from the practice of law for a period of six months. The Petition for Rehearing was denied on May 4, 1973 without comment.

REASONS FOR GRANTING THE WRIT

I.

This case raises substantial questions concerning due process in bar disciplinary proceedings, an area of extreme importance to the legal profession and the public at large, in which guidelines must be furnished by this Court.

Although this Court has recognized the right of an attorney to procedural due process in bar disciplinary proceedings, *In re Ruffalo*, 390 U. S. 544,550 (1968), it has not definitively set forth guidelines which must be

followed by bar disciplinary agencies and reviewing courts in such proceedings in order to assure that this right is a meaningful one. Procedures in bar disciplinary proceedings vary widely from state to state and are inconsistently administered even within a single jurisdiction. As pointed out by the American Bar Association's Special Committee on Evaluation of Disciplinary Enforcement, chaired by former Justice Tom C. Clark, "We are still faced with a lack of uniformity so extensive that there are nearly as many disciplinary structures in this country as there are disciplinary jurisdictions. Report on Disciplinary Enforcement, p. 166 (1970). The multiple problems inherent in bar disciplinary proceedings raise the fundamental question of whether the legal profession can discipline its members in such a way as to protect the public and at the same time guarantee an accused attorney a fair and impartial hearing, consistent with due process standards.

If the legal profession is to continue to discipline itself, at a minimum there must be uniformly recognized standards of fair procedure, and it is submitted that these standards must be established by this Court. In bar disciplinary proceedings, perhaps more so than in any other area, "It is procedure that marks much of the difference between rule of law and rule by fiat." *Wisconsin* v. *Constantineau*, 400 U.S. 433, 436 (1971). In the case at bar the petitioner was found guilty by the reviewing court of acts that were not included in the original charge against her and as to which she had no notice that she would be charged. A crucial issue of credibility was resolved adversely to the petitioner by reliance on evidence

presented in a grand jury proceeding, in violation of the state's own rules, effectively denying the petitioner the right of confrontation and cross-examination. The penalty recommended by the Board of Governors was a six month suspension, and the petitioner was ordered to show cause why this penalty should not be imposed, but instead the reviewing court imposed a penalty of permanent disbarment.

This Court should make clear what due process requires in bar disciplinary proceedings and should furnish guidelines for the state disciplinary agencies to follow in such cases. Substantial questions in this regard are presented in the case at bar, justifying a grant of certiorari by this Court, to insure that discipline will be administered in a responsible manner throughout the states, thereby implementing the interest of the public and the profession in providing appropriate discipline dispensed with due process of law.

II

The holding of the Kentucky Court of Appeals, which makes the final determination as to guilt and punishment in bar disciplinary proceedings, to the effect that it can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge and as to which she had no notice that she would be charged, is clear-

ly not in accord with applicable decision of this Court.

The charge against the petitioner that was filed by the Kentucky State Bar Association read as follows:

> "About May 14, 1971, respondent [petitioner herein] was convicted in the Perry County Kentucky Circuit Court, upon her plea of guilty, to the charge of an attempt to commit an offense under the law of the Commonwealth of Kentucky as provided by KRS 431.065 . . .
>
> WHEREFORE, complainant charges that such facts and actions on the part of respondent constitute unethical and unprofessional conduct . . ." (App., *infra*, p. 24a)

This was the only charge filed against the petitioner, and in going behind the plea of guilty, which the Trial Committee had the power to do (App., *infra*, p. 4a),[3] the Committee limited its inquiry entirely to the question of whether the petitioner prepared and cashed Sally Fugate's check in

3. The petitioner contended that she did not commit that offense but pleaded guilty in exchange for the recommendation of a probated sentence after assessing her chances of prevailing before the jury. The Court of Appeals held that while the Trial Committee could not go behind the plea to find that the petitioner was innocent of the offense, it could do so "in order to determine just what facts the defendant is or was guilty of." (App., *infra*, p. 4a) The Trial Committee found that in fact the petitioner had committed the offense of obtaining money under false pretense by cashing the check and not turning the proceeds over to Odessa Fugate Jones.

the amount of $632.72. There was no consideration by the Trial Committee as to whether the petitioner was the person who forged the Circuit Judge's signature on the deed or removed the deed from the Clerk's office and there was no evidence, even in the transcript of the grand jury proceedings, that connected the petitioner with those transactions.

While pleading guilty to a misdemeanor offense would subject an attorney to disciplinary punishment, it would not, standing alone, justify the extreme penalty of permanent disbarment, particularly where, as here, the Trial Committee and the Board of Governors found that mitigating circumstances were present. See *e.g., In re Carroll*, Ky., 406 S.W.2d 845 (1966); *In re Gordon*, Ky., 402 S.W.2d 854 (1965).[4] In order to justify the imposition of that penalty in the case at bar it was necessary for the Court of Appeals to find that the petitioner had committed "multiple offenses" and had also com-

4. In the *Carroll* case the attorney had been convicted of the federal offense of receiving stolen goods that had moved in interstate commerce, a felony. He was suspended for two years. In the *Gordon* case, the attorney had pleaded guilty to an assault on another attorney and was found by the Trial Committee to have committed three additional charges of improper conduct. He was suspended for six months. As to the imposition of disciplinary punishment for failure to pay over clients' funds see *e.g., Kentucky State Bar Association* v. *Smith*, Ky., 439 S.W.2d 56 (1969), where an attorney who was found guilty of failing to properly keep and pay over money deposited with him by a client to be paid over to a trustee in bankruptcy and of failing to properly apply money received on behalf ot another client incident to the settlement of litigation and of two other offenses was meted a one year suspension.

mitted perjury. (App., *infra*, p. 3a) In so doing, it necessarily found the petitioner guilty of offenses with which she had not been charged. Stated simply and starkly, the Court of Appeals "made the crime fit the punishment."

Its action in this respect was clearly inconsistent with the tenor of this Court's decision in *In re Ruffalo*, 490 U.S. 544 (1968). In that case, on the basis of evidence brought out at the administrative hearings, an additional charge was added and the attorney was found guilty of that charge. The reviewing court found him guilty of that charge and one other and concluded that the two violations required disbarment. In holding that the attorney was denied due process this Court stated:

> "The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.
>
> How the charge would have been met had it been originally included in those leveled against petitioner by the Ohio Board of Commissioners on Grievances and Discipline no one knows.
>
> The absence of fair notice as to the reach of the grievance procedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U. S. at 551-2.

See also *Committee on Professional Ethics and Grievances* v. *Johnson*, 447 F.2d 169 (3rd Cir. 1971); *Jaffee & Co.* v. *Securities and Exchange Commission*, 446 F.2d 387 (2d Cir. 1971).

In the case at bar the denial of due process was even more extreme, since the new charges were not added by the Trial Committee (thereby giving the petitioner at least a belated chance to rebut them) but by the reviewing court. The Court of Appeals found that the petitioner was guilty not only of obtaining money from Sally Fugate under false pretenses, but that she had also forged the Circuit Judge's signature on the deed and had illegally removed the deed from the Clerk's office. There was no contention by the Bar Association that the petitioner had committed either of these acts, and the issue of her having done so was not litigated before the Trial Committee. All of the evidence at the hearing revolved around the question of whether the petitioner had prepared and cashed Sally Fugate's check. There was likewise nothing in the transcript of the grand jury proceedings that remotely connected the petitioner with those transactions. In bar disciplinary proceedings the burden of proof rests on the bar association and the facts must be proved by a preponderance of the evidence. Rules of the Court of Appeals of Kentucky 3.350 (App., *infra*, p. 17a). There is no evidence in the record that would support a finding of guilty on these charges, and even apart from the fair notice requirement, to impose punishment on the basis of such a finding in quasi-criminal proceedings such as these, *In re Ruffalo*, *supra*, would be violative of due process of law. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 248 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969). In any event, the petitioner clearly was given no notice that she was being charged with having committed these offenses

and was given no opportunity to defend against them. She went through the hearings before the Trial Committee believing that she had fairly met the substance of the only charge leveled against her, *i.e.*, that she was guilty of "unethical and unprofessional conduct" because of her plea of guilty to attempting to commit an offense under the laws of Kentucky, and she had presented her case in mitigation as to that charge. To this extent she had been "lulled into a false sense of security," *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964), and would not expect that additional charges would be leveled against her.

Likewise the petitioner had no notice that she would be charged with perjury — the strongest basis for disbarment — if she attempted to go behind the plea of guilty and show that she did not commit any offense. As in *Ruffalo*, petitioner had no notice that she could be "by her own testimony, irrevocably assuring her disbarment under charges not yet made." 390 U.S. at 551. The charge of perjury is particularly important here. It was the petitioner who originally sought to go behind the guilty plea in the hope of mitigating the punishment that would be imposed. She was representing herself and could not help but realize that her explanation of what had occurred would appear, to say the least, "unusual." If she had known that she would face a charge of perjury and the penalty of disbarment if the Trial Committee disbelieved her, she might well have chosen to "take her chances" with the plea on its face. Clearly the petitioner did not have "fair notice as to the reach of the grievance

procedure and the precise nature of the charges." *In re Ruffalo, supra.*

The action of the Kentucky Court of Appeals in disbarring the petitioner by finding her guilty of acts that were not included in the original charge and as to which she had no notice that she would be charged is clearly not in accord with applicable decisions of this Court, justifying the grant of certiorari.

III.

This Court should grant certiorari to determine the substantial question of whether in bar disciplinary proceedings, where the finding of guilt as to the underlying offense that formed the basis of the original charge and as to the additional offenses that formed the basis of the attorney's disbarment depended on the resolution of an issue of credibility, the administrative agency conducting the proceedings in the first instance or the reviewing court can, consistent with due process of law, rely substantially on evidence presented in a grand jury proceeding to resolve that issue adversely to the attorney.

The crucial issue in the disciplinary proceedings in view of the petitioner's plea of mitigation was whether the petitioner did or did not prepare and endorse a check of Sally Fugate's in the amount of $632.72. The petitioner denied having done so, and the Court of Appeals stated: "Her contentions are

refuted by the sworn testimony of a large number of witnesses. Sally Fugate testified that respondent [petitioner herein] prepared all of the papers in question including the check and that the check was delivered to the respondent. Rosie Stacy, daughter of Sally Fugate, accompanied her to respondent's office and was present when the check was made out and witnessed the entire matter." (App., *infra*, p. 3a)[5] However, the "sworn testimony" to which the Court of Appeals refers was that contained in proceedings before a Grand Jury, at which the petitioner, of course, was not present, and the testimony was never subject to cross-examination. Moreover, Sally Fugate did not testify before the Grand Jury that she had ever discussed this matter with the

5. The Court also stated that, "There is unequivocal testimony in the record by a handwriting expert that the writings involved, without question, are those of respondent. An examination of the writings by this court when compared with the known writing of respondent reveals without question that she prepared the documents." (App., *infra*, p. 3a) In point of fact the handwriting expert, Maxwell Allen, only testified that "purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the check." (App., *infra*, p. 64a) The petitioner contended that her late husband, who had on other occasions signed her name on a check, signed her name on the check in question, and she produced a check with the signature on the check admittedly signed in her name by her husband. No effort was made by the Trial Committee to compare the purported signature of the petitioner on the check in question with her husband's signing of her name. If the petitioner was correct in her contention that her husband could sign her name in substantially the same way she did, the signature on the check in question would "compare favorably' with the signature of the petitioner.

petitioner or demanded that the petitioner explain why the proceeds had not been turned over to Mrs. Jones. The failure of Mrs. Fugate to even contact the petitioner in regard to the transaction casts serious doubt on her statement that the petitioner was the person who had prepared the check. What is far more likely is that the check was prepared by the petitioner's late husband and that he represented to Mrs. Fugate that he was doing so on the instructions of the petitioner. When Mrs. Fugate and her daughter were called before the Grand Jury, they were reluctant to disclose this fact since petitioner's husband was not an attorney, and thinking that it would make no difference, testified that the check was prepared by the petitioner.

What happened here, pure and simple, was that the Trial Committee resolved a crucial issue of credibility against the petitioner without ever having seen the persons giving the conflicting testimony and without affording the petitioner the right to cross-examine them.[6] It may well have been that if Sally Fugate had been called as a witness by the Trial Committee, she would have admitted that it was the petitioner's husband and not the petitioner who prepared the check. As will be discussed in more detail subsequently, the reliance on Grand Jury testimony in bar disciplinary proceedings was in flat violation of the Rules of the Court of Appeals. But the Court of Appeals not only accepted the Committee's findings based

6. The only "live" evidence before the Trial Committee was the testimony of the petitioner and the testimony of the handwriting examiner, Maxwell Allen.

on such testimony, but compounded the violation of its own rules by relying on such testimony to conclude that the petitioner had committed perjury.

Whether evidence presented in a grand jury proceeding can be relied on to resolve a crucial issue in a bar disciplinary proceeding adversely to the attorney clearly is a "question of substance not theretofore determined by this Court." The question is presented most strikingly in the present case, since such evidence was relied on by the Trial Committee to resolve an issue going to the credibility of witnesses — as to which face to face confrontation and cross-examination is of utmost importance[7] and by the reviewing Court to support a finding of perjury against the petitioner and to justify her permanent disbarment. There is also an added dimension in the case at bar, since the use of such evidence was prohibited by the Court of Appeals' own rules.

In *Richardson* v. *Perales*, 402 U.S.390 (1971), this Court held that physicians' written reports of medical examinations they had made of a disability claimant could constitute "substantial evidence" supportive of a finding of nondisability. The Court emphasized that the physicians had no interest in the outcome of the proceeding, that the reports were routine and that there was no inconsistency between the reports of the various specialists only differences as to interpretation, that the claimant had the burden of proof on the issue of disability

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7. None of these persons were dead or otherwise unavailable, and all could have been subpoenaed by the Trial Committee.

and could have requested that the physicians be subpoenaed, that the reliability and probative value of such reports had long been recognized and finally that the magnitude of disability claims made reliance on written medical reports necessary. Where such factors are not present, confrontation and cross-examination are more likely to be required, and reliance on extra-judicial evidence not permitted. See *e.g., Blackwell College of Business* v. *Attorney-General*, 454 F. 2d 928 (D.C. Cir. 1971)

What process is "due" depends upon the "precise nature of the government function involved as well as of the private interest that has been affected by a governmental action." *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961). If welfare benefits cannot be terminated unless the beneficiary has "an effective opportunity to confront any adverse witness," *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), an attorney, whose license to practice law represents a valuable property right, *Spevack* v. *Klein*, 385 U.S. 511 (1967), should be entitled to the same confrontation before an important issue of credibility is resolved against her. This is all the more so in a proceeding in which the Bar Association has the burden of proving the charge by a preponderance of the evidence. (App., *infra*, Rule 3.350 p. 17a) The right to confrontation and cross-examination becomes absolutely indispensable where, as here, the resolution of the issue against the attorney results in a finding that she is guilty of perjury and the imposition of the penalty of permanent disbarment.

The petitioner had no reason to suppose that the Trial Committee was doubting her credibility. In the proceedings before the Trial Committee the Bar Association contended that evidence as to the petitioner's innocence or guilt was irrelevant and that discipline should be imposed on the basis of her plea of guilty. If the Trial Committee was going to resolve a crucial issue of credibility against the petitioner, it was incumbent on them to summon Sally Fugate as a witness, so that she could be examined by them personally and be cross-examined by the petitioner. Instead it relied on the transcript of the Grand Jury proceedings, which the petitioner furnished at its request, and concluded, as did the Court of Appeals, that Sally Fugate's testimony before the grand jury was accurate and that the petitioner was lying. All of this was in violation of the Court of Appeals own rules. If attorneys do have the right to confrontation and cross-examination in bar disciplinary proceedings, the transcripts of Grand Jury proceedings cannot be relied on to prove that attorneys have committed criminal offenses, are guilty of perjury and should be disbarred.

This Court should grant certiorari to resolve this important question.

IV

This Court should grant certiorari to determine the substantial question of whether, where the rules of the highest state court governing bar disciplinary proceedings prohibit the use of testimony before a grand jury in such proceedings, such testimony can be used to determine important issues adversely to the attorney if the attorney does not object to such use.

The Rules of the Kentucky Court of Appeals applicable to bar disciplinary proceedings exclude the use of testimony taken at grand jury proceedings. Transcripts of "other proceedings" can be used as evidence in disciplinary proceedings only when the evidence was taken under oath, the attorney involved had notice, and appeared either in person, by counsel or as an attorney for a party. Rules of the Kentucky Court of Appeals 3.360 (App., *infra*, p. 17a) The Trial Committee blatantly disregarded this rule when it received the transcript of the grand jury proceedings into evidence and based its finding on the crucial issue of whether the petitioner prepared and cashed the check in question on the testimony of Sally Fugate and her daughter Rosie Stacy, before the grand jury. The Court of Appeals went even further and relied on the grand jury testimony to support a finding that the petitioner had committed perjury.

The failure of the government to follow its own rules and regulations when dealing with a citizen is the clearest violation of due process of law. *Service* v. *Dulles*,

354 U.S. 363 (1957). The question presented in the case at bar is whether the due process violation is vitiated when the bar authorities and the courts do not follow their own rules in disciplinary proceedings if the attorney does not object. It is submitted that the duty of the government to follow its own rules is a non-waivable duty owed to the society as a whole and not merely to the individual involved. To sanction a violation because the individual involved does not object can only encourage the government to violate its own rules when it finds them "inconvenient" to follow. This is especially so when there is a felt pressure to "go along" with what the government wants.

This danger is clearly demonstrated in bar disciplinary proceedings, where the agency that must decide whether to follow the rules is also the agency that determines guilt and recommends punishment. In the case at bar the petitioner was admittedly subject to disciplinary punishment because of her plea of guilty to the crime of attempting to commit an offense. Her only hope was to make out a strong case of mitigation and to impress the Trial Committee with her sincerity and willingness to cooperate with them in any way. When the Committee made clear its desire to consider the grand jury transcript, which the petitioner had in her possession, and to have it introduced into evidence, she was in no position to refuse. If petitioner had been represented by counsel, as in retrospect she should have been, counsel might have objected, but this was a posture that the petitioner could not take.

Moreover, the petitioner had no way of knowing that the Trial Committee was going to use the grand jury transcript to resolve a crucial issue of credibility against her, and certainly had no basis for believing that the Court of Appeals was going to use it to find that she had committed perjury and disbar her. Even if it were possible for there to be a "waiver" of the government's duty to follow its own rules, the "waiver" would apply only to the charge as to which the government was purportedly acting and not to charges that were never made until the final step in the proceedings.

This Court should hold that the duty of the government to follow its own rules and regulations applies whenever the government acts, and that in bar disciplinary proceedings disciplinary committees and reviewing courts must follow the rules that have been promulgated for such proceedings. Any other standard will encourage widespread violation of this elementary principle of due process. This Court should grant certiorari to resolve this important question.

V.

This Court should grant certiorari to determine whether, when an attorney is issued an order by the highest state court to show cause why she should not be suspended for six months, the court can, consistent with due process, enter an order disbarring the attorney.

There is something "fundamentally unfair" in a court's issuing an order to an attorney to show cause

why she should not be suspended from practice for six months and after she has tried to do so, entering an order permanently disbarring her from the practice of law. When the petitioner "came away" from the Board of Governors, so to speak, she faced a punishment of six months' suspension. While it is true that the recommendation of the Board of Governors to the Court of Appeals was advisory only, and while the Court of Appeals is the final arbiter as to guilt and punishment, nonetheless, in these circumstances an attorney does not think that she will "come away" from the Court of Appeals being permanently disbarred from the practice of law. It is submitted that the due process requirement of "fair notice" in bar disciplinary proceedings also includes notice that the reviewing court is considering imposing a qualitatively different punishment from that recommended by the disciplinary committee. It is also submitted that due process requires that an attorney be specifically informed in advance when the reviewing court is considering imposing the ultimate penalty of permanent disbarment.

If the petitioner had known realistically that she was facing permanent disbarment when the case came before the Court of Appeals, there is certainly a great likelihood that she would have proceeded differently. At a minimum she probably would have retained an attorney to represent her. How she would have handled the case if she had been specifically informed of what she was facing, "no one knows." *In re Ruffalo, supra,* 390 U.S. at 544.

It was certainly reasonable for the petitioner to expect that a penalty of the same nature as that recommended by the Board of Governors would be imposed. This is particularly so here, since so far as she knew up until the time the case came before the Court of Appeals, she was only being charged with "unethical and unprofessional conduct," and the only issue that had been resolved against her went to the issuance of the Fugate check. She did not know that she was facing disbarment on the basis of other charges, including perjury. If the Court of Appeals had been required to give the petitioner notice that she was facing the penalty of permanent disbarment, it would also have been required to inform her that she was facing "multiple charges" that had not been made against her previously. Truly the show cause order "lulled her into a false sense of security." *Bouie* v. *City of Columbia, supra.*

It is submitted that when the reviewing Court issues an order to an attorney to show cause why she should not be suspended for six months, it has necessarily imposed a self-limitation on the possible punishment, and in essence lacks "jurisdiction" to impose the ultimate punishment of permanent disbarment. It is not disputed that the reviewing court can impose such punishment; all the petitioner contends is that due process requires that it specifically inform the attorney of what she faces before such punishment is imposed.

In *In re Ruffalo, supra,* this Court held that due process required that an attorney in disciplinary proceedings be given fair notice of the charge against him. This Court should grant certiorari in the case at bar

to determine whether the fair notice requirement also necessitates that the attorney be specifically advised when the tribunal that determines punishment is considering imposing the ultimate sanction of permanent disbarment, or at least whether this is required when the recommendation of the disciplinary committee is a qualitatively different punishment of six months' suspension.

CONCLUSION

The disbarment of an attorney is a sentence to professional death. And yet it is carried out in this country by widely varying procedures that frequently fall short of those minimum standards of due process that this Court has held must apply whenever "substantial interests" are at stake. In the case at bar the petitioner's career and her reputation have been destroyed on the basis of charges that were not made and on the basis of the testimony of witnesses whom she could not confront nor cross-examine. This case raises questions of fundmental importance to the legal profession and the public whom it serves, and for this reason the Petition for Certiorari should be granted.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506
Attorney for Petitioner

APPENDIX

OPINION OF THE COURT OF APPEALS OF KENTUCKY RENDERED: February 2, 1973

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION ..... COMPLAINANT

V.

IN COURT OF APPEALS

JUDY WARD SMITH ..... RESPONDENT

MEMORANDUM OPINION PER CURIAM

This proceeding is the result of a charge instituted against the respondent, Judy Ward Smith, an attorney, by the Kentucky State Bar Association for disciplinary action as the result of her conduct in the handling of an estate on behalf of her client, Sally Fugate.

Also arising out of this matter were three criminal charges against respondent, to wit: (1) Obtaining money under false pretenses, (2) forgery, (3) removing documents from official files. These three charges were disposed of in a plea-bargaining process wherein respondent entered a plea of guilty to the charge of attempting to commit an offense under the laws of the Commonwealth as provided under KRS 431.065. She was sentenced to twelve months in the county jail.

The factual background of what transpired and culminated in the indictments and these disciplinary proceedings is somewhat lengthy and tortuous. How-

ever, we will attempt to state it in an abbreviated form.

Respondent, a practicing attorney in Perry County, Kentucky, in the years of 1969 and 1970, represented Mrs. Sally Fugate, mother of Everett Fugate who died intestate without issue, leaving as his heirs his mother Sally and his wife Odessa Fugate Jones. One of the assets of the estate was a house and lot to which the mother desired to acquire title. To this end she sought the services of respondent. A deed was prepared in respondent's office, which purported to be a judicial deed. This deed was filed in the Perry County Court Clerk's office and later illegally removed from the records. It bore what purported to be the signature of the circuit judge. For the services rendered and as consideration for the settlement of the estate, Sally Fugate issued her check on the Citizens State Bank of Hazard, Kentucky, in the amount of $632.72 to respondent as escrow agent. Respondent's signature appears on the back of this check indicating that she endorsed it when it was cashed.

It developed as a fact in the case that there had been a suit filed in Perry Circuit Court to settle the estate with no steps taken since the institution of the action. The circuit judge had ordered no deed and had signed no deed. Odessa Fugate Jones had not agreed personally or through her attorney to any settlement of the estate. She received no portion of the funds paid by Sally Fugate to respondent as her attorney. In short, the following crimes had been committed. Sally Fugate had been swindled out of $632.72. The

signature of the circuit judge, Don A. Ward, had been forged to a fraudulent court deed, which had been placed on record in the county clerk's office. This same deed had been removed from the records of the county clerk's office. Respondent's defense to this entire matter consisted of a denial that she had anything whatsoever to do with it. In fact, she denies any knowledge of the transaction and asserts that at the time it all took place her husband, who was not a lawyer, was suffering from a brain tumor and was irresponsible and that he more than likely performed all of the acts that are attributed to her.

Her contentions are refuted by the sworn testimony of a large number of witnesses. Sally Fugate testified that respondent prepared all of the papers in question including the check and that the check was delivered to respondent. Rosie Stacy, daughter of Sally Fugate, accompanied her to respondent's office and was present when the check was made out and witnessed the entire matter. Marilyn Burke served as respondent's secretary during the time that the papers in question were being prepared. Also, there is unequivocal testimony in the record by a handwriting expert that the writings involved, without question, are those of respondent. An examination of the writings by this court when compared with the known writing of respondent reveals without question that she prepared the documents. Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent has committed perjury in her attempt to extricate

herself from these charges. Even though the Bar Association has recommended a lesser penalty this court feels that it has no alternative under the circumstances but to disbar respondent permanently from the practice of law in this Commonwealth. Even though we have previously held that once an attorney is adjudged guilty of a felony or a misdemeanor involving dishonesty as defined in Cotton v. Commonwealth, Ky., 454 S.W. 2d 698 the Trial Committee and Board of Governors should not consider testimony which reinquires into the issue of guilt, it has not been held that they cannot and should not examine the facts [out of which a plea of guilty is entered.] It is true that if the defendant pleads guilty to a reduced charge he cannot later insist that he was not guilty of the charge for which he was convicted. In Re Rudd, Ky., 221 S.W. 2d 688; In Re Shumate, Ky., 382 S.W. 2d 405; In Re Carroll, Ky., 406 S.W. 2d 845. However, this does not mean that the Board of Trial Committee in its investigative capacity cannot look behind a plea of guilty especially where plea bargaining is involved in order to determine just what offenses the defendant is or was guilty of.

As previously stated, the trial committee and Board of Governors recommended a lesser punishment than we are here inflicting. Apparently they were somewhat impressed by the fact that respondent's actual conviction was for a misdemeanor and not a felony. We are not so impressed. The offenses are multiple; they are too serious in nature and reflect a degree of dishonesty totally abhorrent to all

principles enunciated in the code of ethics of the legal profession.

We, therefore, order and adjudge that the respondent, Judy Ward Smith, be permanently disbarred from practice of law in the Commonwealth of Kentucky.

ATTORNEYS FOR COMPLAINANT:

Henry H. Harned, Director
Leslie Whitmer
Kentucky State Bar Association
Capitol Building
Frankfort, Kentucky 40601

Frank Coryell
305 Kentucky Home Life Building
Louisville, Kentucky 40202

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ORDER OF THE COURT OF APPEALS OVERRULING PETITION FOR REHEARING

PETITION FOR REHEARING OVERRULED May 4, 1973

MANDATE

THE COMMONWEALTH OF KENTUCKY

The Court Of Appeals 73 Term—February 2, 1973

Kentucky State Bar Association vs: Judy Ward Smith

Appeal from a judgment of

the Court of Appeals

The Court being sufficiently advised, delivered a per curiam order[ed] confirming report of Board of Bar Governors.

It is therefore ordered the recommendation of the Board be confirmed and respondent, Judy Ward Smith, is hereby permanently disbarred from the further practice of law in this State.

It is further considered that the respondent pay the cost herein expended.

A copy—Attest: /s/ Frances Jones Mills, C.C.A.

By....., D. C.

Issued Friday, May 4, 1973

* * * * * * *

ORDER OF THE COURT OF APPEALS SUSPENDING EXECUTION OF THE MANDATE

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

VS. IN COURT OF APPEALS

JUDY WARD SMITH RESPONDENT

ORDER SUSPENDING EXECUTION
OF MANDATE

On motion of Judy Ward Smith the execution of this Court's mandate, issued May 4, 1973, is suspended for a period of time to and including August 20, 1973, to permit her application to the Supreme Court of the United States for review of this Court's opinion.

Palmore, C. J., Osborne, Steinfeld and Stephenson, JJ., sitting. All concur.

ENTERED May 22, 1973.

/s/ C. J. Palmore, Chief Justice

* * * * * * *

RULES OF THE COURT OF APPEALS OF KENTUKY

3.130—Code of Professional Responsibility Recognized as Authority—The Court recognizes and accepts the principles embodied in the American Bar Association's Code of Professional Responsibility as a sound statement of the standard of Professional conduct required of members of the bar, and the Board may cause to be tried all charges brought under this code as well as charges for other unprofessional or unethical conduct calculated to bring the bench and bar into disrepute.

3.140—Initiation of Disciplinary Cases—When it comes to the attention of the Board or any officer that an attorney may have been guilty of unprofessional conduct, or has been complained against for such conduct, the matter shall be reported to the President who shall cause such investigation to be made, as may be necessary and he shall cause notice of the pendency of the complaint to be given to the attorney involved who shall have fifteen days within which to respond thereto.

3.150—Investigations and Trials to be Prompt—All investigations and the trial of all disciplinary cases shall be begun, prosecuted and completed as promptly as the ends of justice will permit. Neither the unwillingness of the complainant to prosecute, nor an offer of settlement, compromise or restitution shall delay the investigation, trial or report to the Board.

3.160—Unfounded Complaints—If the President deems any accusation, letter or complaint against an attorney unfounded, he may withold action thereon until the next meeting of the Board at which time he shall submit the matter to the Board. Except in cases where a fee or deposit for costs has been paid in advance to an attorney by a client, a complaint which is based solely upon an attorney's failure to answer letters, or to do so punctually, or to prosecute the business of the attorney's client with such speed or diligence as the latter expects or desires, shall be deemed unfounded and the President without referring the matter to the Board, may decline to entertain it and direct the Director to return the complaint to the person from whom received with a letter of explanation. When a complaint which the President deems to be unfounded is by him referred to the Board, the Board may, without investigation, decline to entertain the complaint and direct the Director to return the same to the person from whom received with a letter of explanation.

3.170—Proceedings not Public: Exception — Nothing connected with a disciplinary case shall be made public unless ordered by the Court.

3.180—Charges; Form; by Whom and Where Filed—If the Board determines, by a majority vote, that a complaint should be tried, a charge shall be prepared stating the name and present or last known address of the attorney and facts alleged to constitute unprofessional conduct. The charge shall be signed by the President or such officer of the Association as

the Board may authorize and filed in the office of the Director.

3.190—Appointment of Trial Committee; its Powers and Qualifications—If the pleading present any issue of fact, the President shall appoint a Trial Committee composed of three members of the House of Delegates one of whom shall be named Chairman, and none of whom resides or has his office in the same judicial district as the respondent. The chairman shall possess the qualifications and powers of a circuit judge under a commission from the Chief Justice. The Director shall immediately notify each member of the Trial Committee of his appointment, and shall furnish each with a copy of the pleadings.

3.200—Notice of Appointment of Trial Committee and Hearing—Upon the appointment of a Trial Committee the Director shall notify the parties of the names and addresses of its members. The Chairman of the Trial Committee shall fix the time and place of the hearing and the Director shall give notice thereof to the parties. Such hearing shall be not less than twenty days after the date of the notice.

3.210—Challenge to Qualifications of Trial Committee—Any time, not later than ten days before the date set for hearing the respondent may, by motion, challenge for cause any member of the Trial Committee. If the challenge is such as might disqualify a circuit judge the President shall relieve the challenged member and immediately fill the vacancy.

3.220—Joinder and Consolidation—

(a) Any number of acts or omissions, and any number of separate and distinct transactions, alleged to constitute unprofessional conduct on the part of an attorney may be alleged in a single charge in separate counts. Separate charges may, by order of the Board, be consolidated and tried as a single disciplinary case.

(b) A charge may be filed against two or more attorneys if based on the same or related state of facts and separate charges against two or more attorneys based upon the same or related state of facts may, by order of the Board, be consolidated and tried as a single disciplinary proceeding. Where two or more attorneys are proceeded against in the same proceeding the Trial Committee shall make a separate report to Board as to each.

3.230—Notice of Filing Charges; Time to Answer—Upon the filing of a charge the Director, by certified mail return receipt requested, shall furnish the respondent with a copy of the charge and notify him:

(a) Of the name and address of the attorney for the Association.

(b) That he must within twenty days after receipt of the notice file his answer and three copies with the Director and serve a copy of the answer on the attorney for the Association.

3.240—Absent Respondents; Appointment of Attorney--If the copy of the charge and notification, mailed to the respondent as required by RCA 3.230, is undelivered and returned to the Director, the President shall, by order, appoint an attorney for the respondent. The Director shall furnish such attorney copies of the order appointing him to represent the respondent, the charge and the notification. It shall be the duty of an attorney so appointed to exercise reasonable diligence to notify the respondent personally or by mail of the nature and pendency of the charge against him. Not less than thirty days nor more than fifty days after his appointment, the attorney appointed for the respondent shall file a report stating what efforts he has made to locate and notify the respondent and whether the respondent has been apprised of the charge. If the report of the appointed attorney states that he has caused the respondent to be notified of the nature and pendency of the charge, no further duty shall be required of the attorney. If the report does not so state, it shall be the further duty of the appointed attorney to attend the hearing before the Trial Committee and thereat to represent the respondent, however, he shall not be required to make a factual investigation of the charge. A respondent for whom an attorney is appointed, as herein provided, shall be deemed to have been constructively summoned on the thirtieth day after the date of the order appointing his attorney. He may file an answer within twenty days after the date on which he shall have been deemed to have been constructively summoned.

3.250—Pleadings and Preliminary Motions—There shall be a charge and answer and, when permitted by the Trial Committee, a reply and such amendments to pleadings as may be required to serve the ends of justice. Averments in an answer or a response shall be taken as denied or avoided. No preliminary motions may be filed except:

(a) For a more definite statement of the charge or answer.

(b) Challenging the qualifications of the Trial Committee as provided by RCA 3.210.

3.260—Filing and Processing of Pleadings and Other Papers—After a charge is filed and before any proceedings are instituted in the Court, an original and three copies of all further pleadings, notices, motions, orders and briefs shall be sent to the Director who shall file the original and forward one copy to each member of the Trial Committee. All other reports, inquiries, letters, letters of transmittal and other communications shall be sent to, and processed by, the Director. No such paper or copy thereof shall be sent, or on behalf of any party of the Court, the Board, the Trial Committee or any member thereof.

3.270—Service of Pleadings and other Papers—A copy of any pleading after the charge and of any notice, motion, order and brief shall be served by counsel upon each other counsel of record in the proceeding.

3.280—Rights of Respondent Against Whom a Charge has Been Filed — The respondent against whom a charge has been filed shall have the right to be represented by counsel and entitled to a hearing before a Trial Committee. He shall have all the rights secured to a party by the Rules of Civil Procedure with respect to the introduction of evidence, the right to compel the attendance of witnesses; and the production of books, papers and documents or other writings except those contained in the investigative file of the Board. He shall have the right to an oral argument or to file a brief before the Trial Committee. He shall be afforded a full opportunity to remain silent, to defend himself by the introduction of evidence and to cross-examine witnesses called against him. If the respondent be unable to employ counsel, the President, upon written request in affidavit form, made within twenty days after service of the charges, shall appoint counsel for the respondent.

3.290—When Charge May be Taken as Confessed —The Trial Committee may take the allegations of the charge as admitted or confessed if a respondent, who is notified of the charge by the Director in accordance with RCA 3.230 or who receives notice of the charge from his attorney appointed in accordance with RCA 3.240, files an answer admitting the charges or fails to file an answer within the time provided in these Rules. The Trial Committee, in its discretion, may receive such evidentiary material as may be of assistance in making its recommendation to the Board.

3.300—When Charge Shall not be Taken as Confessed—No charge against a respondent shall be taken by the Trial Committee as confessed when the respondent shall have been constructively summoned under RCA 3.240, unless the report of the respondent's appointed counsel states that he has caused the respondent to be notified of the nature and pendency of the charge.

3.320 — Mental Disability After Misconduct Charged—If, after a charge of unprofessional conduct has been filed against an attorney, the Trial Committee has reason to believe and, after a hearing before that committee, finds that the respondent is of unsound mind, mentally ill, mentally defective or for whom a committee has been appointed or addicted to intoxicants or drugs to such an extent that, in the judgment of the trial committee, he is incapable of conducting a proper defense to the charge against him, the Trial Committee shall recommend to the Board and the Board shall recommend to the Court that the respondent be suspended from the practice of law. If the Court orders his suspension, it shall also direct that all further proceedings on the charge be held in abeyance until it shall appear to the Court, upon application made by the respondent, that he is mentally capable of conducting a proper defense to the charge in question; therefore, a hearing on the charge shall be held as provided by the Rules relating to disciplinary cases. If the Trial Committee concludes that the charges have not been sustained, or, having been sustained, do not warrant suspension or

disbarment, then the respondent shall be restored to membership in the Association if and when he has satisfied the Trial Committee, the Board and the Court by clear and convincing evidence that he has been so completely cured of such insanity, mental illness, mental defectiveness, or addiction that there is little or no likelihood of a recurrence of the condition.

3.330—Procedure When Attorney has been Convicted of an Offense Involving Moral Turpitude — Whenever it shall come to the attention of the Board that an attorney has been convicted of an offense involving moral turpitude, it shall order the Director to promptly obtain a certified copy of the judgment of conviction. The Board shall direct that a charge be filed against such attorney. If an answer is filed from which it appears that facts or circumstances may exist which would be in mitigation of the offense or of the discipline which may be imposed, the Board may order the appointment of a Trial Committee and the Board shall by order confine the issues to be considered, and the evidentiary material to be received.

3.340—Procedure When Pleadings Present Only an Issue of Law—If the pleadings only present issues of law the Board shall fix a time for the filing of briefs. Thereafter the Board shall consider the briefs and report its recommendation to the Court.

3.350—Order of Proceedings and Burden of Proof —The Trial Committee shall determine and regulate the order of proceedings at the hearing. Upon the

application of a party or upon direction of the Trial Committee the Director shall issue subpoenas for the attendance of witnesses or the production of evidence. The burden of proof shall rest upon the Association in a disciplinary proceeding and the facts must be proven by a preponderance of the evidence. In reinstatement hearings the burden shall rest upon the applicant. Before submission the Trial Committee may direct such oral argument as it deems appropriate and receive briefs from all parties on such terms as it may impose. After submission of the case to the Trial Committee there shall be no further oral argument or briefing either before the Trial Committee or before the Board.

3.360—Introduction and Admissibility of Evidence, Evidence Taken in Other Proceedings—The testimony at all hearings shall be in person, except that the parties may use depositions under the same standards as those prescribed by the Kentucky Rules of Civil Procedure. The rules of evidence applicable in civil actions shall apply.

Where, in any proceeding, evidence has been taken under oath upon due notice to the Respondent, and at the taking of which Respondent has appeared, either in person or by counsel, or as attorney for any party, a duly certified transcript of all, or the essential portions, of such proceedings may be used as evidence in any hearing provided for in RCA 3.200, or in any investigation antecedent to or in connection with any disciplinary case in-

volving the same charge or any charge growing out of matters connected therewith, and such transcript and record, or parts thereof, may be made a part of the record on any hearing or investigation.

3.370—Transcript of Evidence—The proceedings before the Trial Committee shall be reported by a reporter appointed by the Trial Committee. However, after hearing, if the Trial Committee is of the unanimous opinion that the respondent should only be administered a private reprimand or that all charges should be dismissed the Trial Committee may, with the consent of the parties, direct the reporter to preserve all notes of the hearing but defer a transcription of the record until ordered by the Board to prepare such transcript. In all other proceedings the testimony shall be transcribed.

3.380—Trial Committee to File Report With Board—When a disciplinary proceeding has been finally submitted, the Trial Committee shall promptly file with the Board the entire transcript of the proceeding, the transcript of testimony together with such briefs as may have been filed and a written report in the nature of a findings of fact and conclusion of law, which shall contain a concise statement of:

(a) the charges made against and the defense offered by the respondent;

(b) the proceedings had;

(c) the facts which the Committee deems proven

by a preponderance of the evidence, the Committee's conclusions; and

(d) its recommendations as to the disposition of the case.

The Trial Committee's report shall constitute a part of the record in the case and a copy of such report shall be served upon counsel for the parties. The report shall be advisory.

3.390—**Board's Action on Trial Committee's Report**—Upon receipt of report of the Trial Committee the Board, except the Chairman and Chairman-elect who shall have no vote in any disciplinary proceedings, shall promptly consider and act upon the entire record. The Board shall decide, by a roll call vote, whether the respondent is guilty or not guilty. If the respondent be found not guilty, the Board's action is final. If the respondent be found guilty, the Board shall then decide, by a second roll call vote, the disciplinary action to be recommended. Both the finding of guilty and the disciplinary action to be recommended must be agreed upon by a majority of the members of the Board entitled to vote in disciplinary proceedings. The result of each of the two votes shall be recorded in the Board's minutes. The President shall sign and file with the Director an order setting forth the Board's action and the Director shall mail copies of such order to the parties and to each member of the Trial Committee. If discipline is ordered by the Board or recommended to the Court a copy of the order shall be filed with the Clerk. Any order recommending to

the Court that disciplinary action be taken shall be advisory. Promptly after the filing of the order of the Board the Director shall file with the Clerk the entire record commencing with the charge and a certified bill for the costs and expenses incurred by the Board and the Trial Committee in the investigation preliminary to and in the conduct of the proceedings.

3.400—Degrees of Discipline—Upon a finding by the Board of guilt of unprofessional conduct, discipline may be administered by way of private reprimand issued by the Board without further proceedings or right of appeal to the Court; or, by the Court, upon recommendation by the Board, by way of public reprimand, censure, suspension from practice or disbarment. If a private reprimand is issued, it shall not be made public and shall be transmitted only to the respondent, or to his attorney, and to the attorney for the complainant.

3.410—Rehearing by Trial Committee or Board—Rehearing shall not be permitted except for newly discovered evidence so material to the rights of either party as to affect the finding and recommendation which could not have been discovered by the exercise of reasonable diligence and then only if such evidence is first presented in affidavit form, together with the affidavit of counsel that such evidence could not have been discovered sooner by the exercise of reasonable diligence. After the Trial Committee has made its report to the Board, no rehearing shall be permitted by the Trial Committee. After the Board

has determined the guilt or innocence of the respondent and the discipline to be imposed by it or recommended to the Court, no rehearing shall be permitted by the Board. After the Board has filed its order under RCA 3.390 the Court may remand the case to the Board with directions that the Trial Committee receive further evidence upon such matters and to such extent as the Court may direct.

3.420—Procedure in the Court—Promptly upon the filing of the order as provided in RCA 3.390, the Clerk shall advance the case on the docket and shall forthwith issue a rule against the respondent returnable within twenty days after service of the rule, requiring the respondent to show cause why he should not be adjudged guilty of unprofessional conduct and disciplined therefor. When the respondent is proceeded against by warning order, the rule shall be deemed to have been served thirty days after the date of the making of the warning order. If response is not filed when due the Court shall enter judgment against the respondent, adjudging him guilty of unprofessional conduct and disciplining him. When a response is filed, the respondent shall furnish a bond with surety acceptable to the Clerk, conditioned that if the principal in the bond be disciplined by the Court, he will promptly pay all costs incurred in the proceedings, including those certified under RCA 3.390. If he files his response in forma pauperis no bond shall be required.

3.430—Attorney General May Represent the Board—The Attorney General of Kentucky, upon request, shall act as counsel for the Association. In all cases the Board may appoint special counsel.

3.440—Duty to file brief—If respondent timely files response it shall be supported by a brief and the Board shall have thirty days thereafter to file its brief.

3.450—Disposition of Case—Upon submission of the case the Court will enter such orders as it may deem proper. The provisions of the Rules regarding petition for rehearing and issuance of a mandate shall apply. The Clerk shall promptly furnish a copy of the order of disposition to all parties and the Director. Every such order except those for private reprimand, shall be published as are other opinions of the Court and an attested copy shall be forwarded by the Clerk to the circuit clerk who shall record the attested copy in the Commonwealth Order Book and index the same.

3.460—Recovery of Costs—Every final order of the Board or the Court which adjudges the respondent guilty of unprofessional conduct shall provide for the recovery of all costs, including those certified under RCA 3.420. Immediately upon the effective date of the order the Clerk shall furnish a cost bill to the respondent, and if the bill is not satisfied within ten days thereafter, the Clerk shall issue one or more

executions thereon, directed to the sheriffs of the counties in which the respondent and the sureties on his bond reside. So much of the costs collected by the Clerk as represent those incurred by the Board shall be promptly refunded to the Association.

* * * * * * *

CHARGE AGAINST PETITIONER
March 29, 1971

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

v. CHARGE

JUDY WARD SMITH RESPONDENT

* * * * * * * *

Comes now the Kentucky State Bar Association, by and through its Board of Governors, and states that respondent, Judy Ward Smith, whose last known address is 12 Highland Drive, Bowling Green, Kentucky, a member of said Association did engage in the following conduct:

About May 14, 1971, respondent was convicted in the Perry County Kentucky Circuit Court, upon her plea of guilty, of the charge of an attempt to commit an offense under the law of the Commonwealth of Kentucky as provided by KRS 431.065. A true and correct copy of an order evidencing the plea of guilty is appended hereto marked Exhibit "A" and made a part hereof.

WHEREFORE, complainant charges that such facts and actions on the part of respondent constitute unethical and unprofessional conduct; that the same are calculated to bring the bench and bar of Ken-

tucky into disrepute; and that discipline of an appropriate degree should be administered to the respondent in accordance with RCA 3.400.

KENTUCKY STATE BAR ASSOCIATION
By: Allen Schmitt, President

H. H. Harned, Director
/s/ H. H. Harned, Director

CRIMINAL ORDERS

PERRY CIRCUIT COURT

MAY TERM, 3rd Day, 6th Day of MAY, 1970

COMMONWEALTH OF KENTUCKY
PLAINTIFF

VS: NO. 2304 — OBTAINING MONEY UNDER FALSE PRETENSES

JUDY WARD SMITH DEFENDANT

* * * * * *

This cause came on for trial. Came then Commonwealth and announced ready. Defendant represented by Hon. Alva A. Hollon waived formal arraignment and entered a plea of not guilty, whereupon came the following jury to-wit: Mrs. Floyd Baker, Carolyn Wells, Mrs. Zack Anderson, Ellis Grigsby, Helen Napier, Elmer Whitaker, Mildred Epperson, Matilda Hobbs, Corbett Brashear, Vilas Grigsby,

John Gross and Amos Ison. Came then Defendant and changed her plea to guilty of the crime of Attempting to Commit a Felony, waived a jury trial and asked the Court to fix her punishment. Came then Commonwealth Attorney and made recommendation defendant be given one year in the County Jail and probated.

/s/ STEPHEN COMBS, JR. SPECIAL JUDGE

STATE OF KENTUCKY
COUNTY OF PERRY

I, Grace Holliday Strong, Clerk of the Perry Circuit Court certify that the above and foregoing is a true and correct copy of the Order of Trial in the matter of Indictment No. 2304, Commonwealth of Kentucky vs. JUDY WARD SMITH as appears of record in my office in Criminal Order Book No. 50 at page 631.

WITNESS my hand and official seal this the 23rd day of March, 1973.

GRACE HOLLIDAY STRONG,
Clerk, Perry Circuit Court
By Carrie Holliday, D.C.

* * * * * * *

RESPONSE OF PETITIONER TO CHARGE

COURT OF APPEALS OF KENTUCKY
KENTUCKY STATE BAR ASSOCIATION

COMPLAINANT

VS: RESPONSE

JUDY WARD SMITH RESPONDENT

Comes now the Respondent, Judy Ward Smith, and states as following the Response to the Charge filed herein:

I

Respondent admits the material allegations of Paragraph I of the Charge filed, but denies that they occurred on May 14, 1971.

II

Respondent states that restitution in the amount of $641.22 (Six hundred forty-one dollars and twenty-two cents) was made to Mrs. Sally Fugate, Hazard, Kentucky, and evidence of said restitution is hereby attached, being witnessed by Commonwealth Attorney Tolbert Combs and Mrs. Rosa Stacy, daughter of Mrs. Fugate. Respondent declares that at no time was it her intent that Mrs. Fugate should be defrauded or deceived as to her just share in her deceased son's estate, in which matter Respondent represented

Mrs. Fugate in Perry Circuit Court. Respondent states that the distributive rights of Mrs. Fugate were not damaged, injured, harmed, or prejudiced, and that settlement of said estate was still pending at time of Respondent's plea.

III

Respondent states that she did not receive or cash the alleged check involved in this matter, that the bank teller whose number appears on the check did not recall her cashing said check, that respondent did not maintain a bank account with said bank but that Respondent's late husband did maintain an account there, and had upon different occasions taken checks of Respondent's to the bank for cashing; that subsequent to return of the indictment, Respondent's husband and she separated after intimation from him that he had seen to it that "Respondent would not practice law very long in the state of Kentucky." Respondent states that, unknown to her at this time, her late husband was suffering from malignant pituitary tumor pressing on the brain, causing acute change of personality, evidenced by irrational behavior and extreme jealousy of her.

IV

Respondent states that her alleged involvement in the political situation in the Perry Circuit Judge's race ripened the minds of members of the Grand Jury as to the return of said indictment; and that said indictment was an avenue of reprisal against the Re-

spondent. Respondent attaches a photocopy of an article from The Courier-Journal and Times, dated January 16, 1970, as background of this situation. Respondent contends that inspite of the fact that the suit was withdrawn, damage to Respondent's professional reputation was accomplished. The Chairman of the Grand Jury when the indictment was returned was Mrs. Ann Medaris, close personal friend of Hon. Garland Wells, son of candidate Hon. Courtney C. Wells, and also attorney for Mrs. Odessa Fugate Jones, Administrator of said estate mentioned in Paragraph II of this Response, and co-worker of Mrs. Garland Wells.

WHEREFORE, Respondent states that she has done all that she could to rectify this matter, both as to her client, and as to her professional conduct before the Bar. This is the first claim ever against Respondent's record of responsibility as a citizen for 28 (twenty-eight) years, and as an attorney for 3 (three) years. Respondent's honor and good name are all that she has to give her 3 (three) year old son. Accordingly, she prays the mercy of the Court in its decision.

Dated: 4-18-71

/s/ Judy Ward Smith
RESPONDENT

* * * * * * *

REPORT OF TRIAL COMMITTEE
May 23, 1972

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION
COMPLAINANT

VS. SUMMARY, FINDING OF FACTS
CONCLUSIONS AND
RECOMMENDATION

JUDY WARD SMITH RESPONDENT

* * * * * *

The Complainant, Kentucky State Bar Association, initiated charges against the Respondent, Judy Ward Smith, subsequent to her conviction, on May 6, 1970, in the Perry County, Kentucky, Circuit Court, on her plea of guilty to the charge of an attempt to commit a felony, a misdemeanor under the law of the Commonwealth of Kentucky, as provided by Kentucky Revised Statutes 431.065.

The Respondent admitted the above allegations, but denied they occurred on May 14, 1971, as set out in Complainant's Complaint.

A pre-trial conference was held on June 4, 1971, at Suite 601 Republic Building, Louisville, Kentucky, at which time the Respondent appeared without counsel, preferring to represent herself. The Complainant was represented by attorneys, Frank Coryell and Les-

lie G. Whitmer, and the Trial Committee was composd of Durward W. Maynard, Chairman, Messrs. John T. Ballantine and Wallace H. Spalding, Jr., as Members.

At this conference, the Respondent advised the Committee that she was prepared to testify without further delay, and after being informed by the Committee of her right to remain silent, to have counsel, to call witnesses, and that anything she said could be considered, either for or against her, she proceeded to give her testimony, after being duly sworn to tell the truth. Unfortunately, the stenographic notes for of this hearing were accidently destroyed before being transcribed, thus, a re-hearing was held on October 8, 1971, at the office of Mr. Joseph Soergel, Court Reporter, 310 West Liberty Building, 310 West Liberty Street, Louisville, Kentucky, at which hearing the same persons mentioned above were present, and at which time the Respondent was again advised of her constitutional rights before she proceed[ed] to testify.

SUMMARY OF PROCEEDINGS

The Respondent, represented a Mrs. Sallie Fugate, mother of Everette Lee Fugate, who died intestate, a resident of Perry County, Kentucky, without issue Everette Lee Fugate was the husband of Mrs. Odessa Fugate Jones, who remarried, and is referred to in the record as Mrs. Odessa Fugate Jones, in the settlement of her deceased son's estate.

One of the assets of the said estate was a house and lot which adjoined the property of Mrs. Fugate, which she wanted as her share of her son's estate. Mrs. Odessa Fugate Jones had been appointed as the Administratrix of her said husband's estate, and appears to have made no effort to settle the same, which resulted in Mrs. Sallie Fugate employing the Respondent to file a settlement suit in the Perry Circuit Court. The filing of this suit greatly upset the said Administratrix, resulting in an argument between her and her mother-in-law, Mrs. Sallie Fugate. The Respondent testified, that in August of 1969, Mrs. Sallie Fugate, called her on the telephone and stated that she had reached an agreement with Odessa Fugate Jones about the said real estate, and instructed her to prepare a deed for her to take to Dayton, Ohio, for Mrs. Odessa Fugate Jones to execute. The Respondent further testified that she prepared the deed which was picked up at her office by Mrs. Sallie Fugate and her daughter, Mrs. Rosie Stacy, and that was the last she heard of the matter until February, 1970, when she was indicted by the Grand Jury of the Perry Circuit Court for obtaining money from Mrs. Sallie Fugate under false pretenses, forgery and removal of Court records.

The Transcript of Evidence heard before the said Grand Jury (Exhibit 6) revaels that both, Mrs. Sallie Fugate and her daughter, Mrs. Rosie Stacy, testified that when they went to the office of the Respondent to pick up the aforesaid deed, Mrs. Sallie Fugate

gave the Respondent a check for Six Hundred Thirty Two Dollars and Seventy-two Cents ($632.72), to purchase the interest of Odessa Fugate Jones, in and to the aforesaid real estate, which check included Respondent's fee for services rendered in the sum of One Hundred Fifty ($150.00) Dollars. Mrs. Rosie Stacy further testified that while she and her mother, Mrs. Sallie Fugate were at Respondent's office as aforesaid, that her mother signed the check and requested the Respondent "to make it out and Judy put it in her name." (See Pages 45 through 49 of said Grand Jury Transcript of Evidence). The check referred to above was filed with Respondent's Deposition, and for identification, is marked "Exhibit 1". While the said Odessa Fugate Jones did not testify before the said Grand Jury, her attorney, Mr. Garland Wells, testified that Odessa Fugate Jones told him that she did not receive any money for the purchase of the said real estate from the Respondent.

The said Transcript of Evidence, further revealed that two checks were involved in the estate of said decedent, Everette Lee Fugate—the one mntioned hereinabove for $632.72, dated and cashed at the Citizens State Bank, Hazard, Kentucky, on August 22, 1969, and another check in the sum of $8.50, written on October 24, 1969, to the Respondent "for legal services, estate of Everette Lee Fugate, and indorsed by J. Ward Smith, and deposited at the Citizens State Bank", making a total of $641.22 involved, and being the exact amount that restitution was made to the said Mrs. Sallie Fugate by the Respondent, however,

the indictment by the said Grand Jury mentioned only the check in the sum of $632.72. The Trial Committee did not see or examine the said $8.50 check.

Various documents were admitted in evidence at the pre-trial hearing as being the handwriting of the Respondent, Judy Ward Smith, and other documents were admitted in evidence as the alleged handwriting of Respondent's deceased husband, James Allen Smith.

The Complainant produced Mr. Maxwell Allen, who was qualified and testified as an expert witness by agreement with the Respondent for reasons mentioned hereinbelow.

The said witness testified that on May 6, 1970, he appeared in the law offices of Respondent's attorneys in Hazard, Kentucky, for the purpose of testifying for the Respondent on the charges for which she was to be tried on that day in the Perry Circuit Court; that after he had examined some check or checks purportedly to be used as evidence in the prosecution of said charges against the Respondent, with other known specimens of her handwriting on checks or miscellaneous papers that he compared them with at the time, and after he had examined the purported originals to study the line quality, he advised one of Respondent's attorneys that he would be unable to help the Respondent after his analysis; that he would have to make some very damaging concessions on her part, and as such he was not used as a witness; that based upon his experience, education and examination

the purported signatures and handwriting of the Respondent compared favorably with the signatures on the checks in question. (See Transcript of Mr. Allen's Deposition, Pages 3, 4, and 5).

The Respondent, Judy Ward Smith, took the stand in her own defense, and testified that she represented Mrs. Sallie Fugate in the matter of her said deceased son's estate, and filed a settlement for her in the Perry Circuit Court; that she did not prepare the deed that was put to record in the office of the County Court Clerk of Perry County, Kentucky, (Exhibit 4, Respondent's Deposition); that her said client picked up the aforesaid deep at her office in August, 1969; that she filed her accounting of the estate with the Court, and sent Mrs. Sallie Fugate a billing of her services, which was never paid, and that was the last she had heard of the "whole thing" until she was indicted by the said Grand Jury in February, 1970.

The Respondent further testified that she did not have an account with the Citizens State Bank in Hazard, Kentucky, and that she did all of her banking with the Peoples Bank in Hazard, Kentucky.

The Respondent further testified that she did not prepare, indorse or ever see the said check for $632.72 until after the said indictments, and that it was her belief that the said money was obtained from Mrs. Sallie Fugate by her late husband, James Allen Smith, who died on August 29, 1970; that he was suffering from a pituitary tumor, and was not employed, hav-

ing lost his job in December, 1968, for taking funds from his employer; that he was extremely jealous of her and their young son; that he told her after the said indictments that he had fixed her from practicing law much longer in Kentucky, and that she had filed divorce proceedings against him the Warren Circuit Court in March, 1970.

The Respondent further testified that she appeared in the Perry Circuit Court on May 6, 1970, for trial, and the Commonwealth's Attorney stated to her that he would move to dismiss the charges of forgery and removal of Court records, if she would agree to plead to an amended charge of attempting to commit a felony on obtaining the money from Mrs. Sallie Fugate; that on the advice of counsel and upon her own assessment of the situation of having no witnesses or anyone to back her up, she entered a plea to the amended charged and reimbursed Mrs. Sallie Fugate the sum of $641.22. (See Respondent's Deposition, Pages 4 through 12).

FINDINGS OF FACT

This Committee makes the following findings and believes, established by a preponderance of the evidence:

1. That the Respondent prepared the check dated August 22, 1969, drawn on the Citizens State Bank of Hazard, Kentucky, and made payable to herself as Escrow Agent, which check was signed by Mrs. Sallie Fugate, in the sum of

$632.72. (See Exhibit 1, Respondent's Deposition)

2. That the indorsement on the back of the said check was affixed by the Respondent.

3. That no part of the proceeds of the said check were ever paid by the Respondent to Mrs. Odessa Fugate Jones for her right, title and interest in and to the said real estate of her deceased husband, Everette Lee Fugate.

CONCLUSIONS

1. Under Kentucky State Bar Association vs. Lester, Ky., 437 S.W. 2nd 958 (1969), the Perry Circuit Court conviction of the Respondent, Judy Ward Smith, "forecloses further inquiry into the issue of respondent's guilt or innocence of the offense." 437 S.W. 2d at 959.

2. Even if inquiry were made into Respondent's guilt or innocence, the findings above demonstrate the Committee's conclusion that Respondent was guilty of the charge of obtaining money under false pretenses.

3. The misdemeanor to which Respondent pleaded guilty was so intertwined with, and such a violation of a lawyer's high ethical obligations to a client and the client's money and property that the offense clearly involved moral turpitude.

4. In the eyes of the public a lawyer convicted (whether on a plea of guilty or otherwise) under the circumstances of this case will bring the bench and bar of Kentucky into disrepute, because to the uneducated layman, the technical terminology of conviction is not significant. What is significant is that in the public eye, a lawyer has now been convicted in a criminal proceeding involving misuse or misappropriation of a client's money. (In this connection, the Respondent herself recognizes that "there is a strong layman's presumption of guilt against an attorney accused of taking money from a client." — Respondent's Brief, Page 7) What better admission of the fact that her conviction will bring the bench and bar into disrepute?

RECOMMENDATION

Such actions cannot be condoned on the part of any professional man or woman, and certainly cannot be overlooked by one sworn to upheld the law as an officer of the Court. Not only is such conduct unethical, it is obviously criminal, however, some consideration must be given to the following mitigating circumstances in Respondent's favor, which would tend to temper the Committee's recommendation with some mercy, with the hope that never again will the Respondent betray the trust imposed upon her as a member of the legal profession:

1. Her inexperience as a nattorney. (Three years practice)
2. The physical infirmity of her husband, James Allen Smith, during said period, which resulted in his death.
3. Consideration of the fact that the Respondent now has the responsibility of rearing and education of an infant son of her marriage.
4. Having made full restitution to her client, Mrs. Sallie Fugate.
5. Her previous good character and conduct, both as an individual and attorney.

WHEREFORE, in view of the above findings, tempered by the foregoing mitigating circumstances, your Committee must, in good conscience, recommend that the Court of Appeals order that the Respondent, Judy Ward Smith, be suspended from the practice of law for a period of three (3) years from the date of this Report.

Respectfully submitted this 23rd day of May, 1972.

/s/ Durward W. Maynard
Durward W. Maynard
Chairman of the Trial Committee

/s/ John T. Ballantine
John T. Ballantine
Member of the Trial Committee

/s/ Wallace H. Spalding, Jr.
Wallace H. Spalding, Jr.
Member of the Trial Committee

FINDINGS AND RECOMMENDATIONS OF BOARD OF GOVERNORS OF THE KENTUCKY STATE BAR ASSOCIATION
July 14, 1972

MEETING
BOARD OF GOVERNORS
RAMADA INN
LOUISVILLE, KENTUCKY

JULY 14, 1972

The next order of business concerned the charge against Judy Ward Smith. The Trial Committee composed of Durward W. Maynard, Chairman; Wallace H. Spalding and John T. Ballantine having tendered a written report recommending to the Board of Governors that the respondent be adjudicated guilty of unprofessional conduct and be administered a three-year suspension, on motion duly made and seconded the report was ordered filed.

On call of the roll, the respondent was adjudicated guilty as charged by a roll call vote of 10-0. Two (2) governors passed. Upon a second call of the roll by a vote of 9-3, it was recommended that the respondent be suspended from the practive of law for a period of six months.

IN RE: JUDY WARD SMITH
FINDINGS AND RECOMMENDATION OF THE BOARD OF GOVERNORS

The above case having been called and a report

having been submitted and the matter having been fully considered, the following findings and recommendation are made:

FINDINGS

That the respondent, Judy Ward Smith, be adjudicated guilty as charged.

RECOMMENDATION

It is respectfully recommended to the Court of Appeals of Kentucky that the respendent, Judy Ward Smith, be suspended from the practice of law in the Commonwealth of Kentucky for a period of six months and required to pay the costs of this action.

This 14th day of July, 1972.

/s/ William E. Rummage
WILLIAM E. RUMMAGE
President

/s/ Henry H. Harned
HENRY H. HARNED
DIRECTOR

RULE TO SHOW CAUSE
July 21, 1972

RULE

ON

FINDING AND RECOMMENDATION

OF THE

BOARD OF GOVERNORS

OF THE

KENTUCKY STATE BAR ASSOCIATION

THE COMMONWEALTH OF KENTUCKY,

To the Sheriff of Warren County, GREETINGS:

The Board of Governors of the Kentucky State Bar Association having filed its finding and recommendation in the matter of

KENTUCKY STATE BAR ASSOCIATION — COMPLAINANT

versus

JUDY WARD SMITH — RESPONDENT

recommending that said Respondent be suspended from the practice of law in the Commonwealth of Kentucky for a period of six months, you are hereby commanded to summons Respondent to appear before the Court of Appeals, Frankfort, Kentucky, or file due response within 20 days after the service of this sum-

mons, and show cause, if any he has or can, why the recommendation of said Board should not be enforced by appropriate orders of the Court, and warn him that upon his failure to answer, the Rule herein shall be made absolute and you will make due return of this summons immediately upon the execution thereof. Issued at Frankfort, Kentucky, this the 21st day of July, 1972.

FRANCES JONES MILLS
CLERK, COURT OF
APPEALS

BY /s/John C. Scott
John C. Scott
Chief Deputy Clerk

* * * * * * *

EXCERPTS FROM DEPOSITION OF PETITIONER
October 8, 1971

* * * * *

[8] MR. SPALDING: Well I think you missed a part in the prior hearing that was concerning itself to the money and where it actually went, if you -know, and concerning your husband and his demise, and I think this should be placed at this point.

A. All right. Its my belief that this money was obtained from Mrs. Sally Fugate by my late husband, James Allen Smith, who died August 29, 1970. I have a copy of this check made to me, as escrow agent, signed by Mrs. Sallie Fugate, endorsed on the other side in my name, as escrow agent, I did not write that check.

I believe that Jim did and I offer to this committee for your consideration a check that had been called to my attention shortly after we moved away from Hazard. This is a court cost check which was endorsed over to me by the Credit Bureau, I was their attorney on retainer, and this is an example of where this check was not taken to a bank, but it was taken to a merchant outlet and he endorsed my name and his name on it. His name does not appear on the Fugate check [9] because it was taken directly to the bank, this was taken to a mercantile outlet, and they did not require, I mean the check was taken to the bank and they didn't make him endorse it at his bank.

Q. 1 Were they cashed or deposited?

A. Both of those checks were cashed.

Q. 2 Were they at the same bank that you generally do business?

A. No, they were taken to the one that was cashed on the, you know, made to me on the escrow agent, that was cashed at the Citizens State Bank of which my husband had a small account there and I did all of my banking with the People Bank in Hazard, Kentucky.

MR. BALLANTINE: Would you write — what is your normal signature?

A. J. Ward Smith.

Q. 3 Would you sign your name a couple of ties on that sheet of paper (indicating)?

A. Yes sir, (indicating four times).

Q. 4 Did you tell us the last time that there was some other episode involving another check that you learned of something about your husband getting other check proceeds?

A. Right. There was a check made payable to me and a Hensley gentlemen, and I could not obtain a [10] copy of that check, so the only other check I could find was in Hazard because Mr. Burke, the signor on the check had moved to Danville and sold out his automobile agency. It was a check for $480 some odd dollars and this check had been endorsed and cashed by Jim, and brought to my attention and I had to reimburse a man on that before we even left Hazard, Kentucky, so he was suffering from a pit-

uitary tumor at that time and he was not employed and he had lost his job in December of 1968, after taking funds from Reynolds Tobacco Company that did not belong to him, and he more or less had been trying to sell insurance and we had been — and he had gone to Western University for summer school session, and it just came to a point where he was giving huge checks on me and more or less putting my personal account in jeopardy at the bank, so I could not get a copy of that check, but I did get a copy of that other check.

Q. 5 Would you tell us and put into the record briefly, and I don't want you to get yourself upset, but briefly put in the history that your husband followed after the discovery of the existence of the pituitary tumor and his pattern of behavior?

A. Yes. From December, 1968, until the date of his death in August of '70, he gained approximately 50 pounds. He slept most or a lot of the time. I'll [11] say 14 to 16 hours a day. He did not work at any occupation. He was given — he already had an insurance salesman's license and he was supposed to be selling insurance and he would go out and not come home for days, and I would ask him where he had been, and he would say it was none of my business, and he gave checks to certain Hazard business men presumably for gambling debts which I took care of. He became extremely jealous of me and our young son, and he left twice that I can remember, and went to his parents' home in Bowling Green, Kentucky, and more or less he just, he was just not the

same person, having no responsibility for anything, financially, socially, or anything. He was liable to say anything to anybody at any time. I knew he was sick but I did not know it was a physical tumor but I thought he was having some sort of a breakdown and I asked him repeatedly to go see a psychiatrist or a doctor because I thought he was sick, and that he should go but he refused, and he said there was nothing wrong with him, and he would have just, what I would call just fits of anger, and he was leaving the house and not coming back for 2 or 3 days at a time. And I never knew where he was or what he was doing, and he went to the bank one time and drew out $200 from our personal account and I didn't know whatever happened to that money. And then we moved to Bowling Green, like I told you a few moments ago in December of '69, and we lived together until March. And at that time he told me after the indictment, he said, "I fixed you, you won't practice law much longer in the State of Kentucky." And he said, "Tell me what prison do they send women to in Kentucky, Eddyville or LaGrange?" And I left that night, and I went to my parents house and that was in March of '70, and I have been there ever since. I filed divorce proceedings in the Warren Circuit Court and that was still pending at the date of his death.

MR. BALLANTINE: When did you all find out about the tumor, roughly, was it after you had moved to Bowling Green?

A. Right, right. It was roughly in July of '70.

Q. 6 Shortly before his death?

A. Right. After they diagnosed his condition as a tumor they would not let him leave the hospital because they thought he would have another black out and they operated on him and he never came out of surgery.

Q. 7 Did you all — well how long had you been married?

A. 7 years.

Q. 8 And during the first years of your marriage had he ever behaved similarly to that?

A. We married in September of '63, and I had just graduated from college and Jim was in the Air Force in Oklahoma and he was having abdominal pains and other related — never headaches, but abdominal pains and I took him to the base hospital several times and in the spring of '64, and they more or less decided that he was a hypochondriac, and they sent him to a psychiatrist at the Air Force base, Sheppard Air Force Base down there, at Wicitaw Falls, and then his parents came out there then that next summer and he seemed to get better after that, and the first two or three years were very happy years. He was in the Air Force and I worked for a local finance company and then he just — I don't know, his personality started changing, argumentative and the least little thing would set him off, you know, and I came back to Kentucky to go to law school which

he was going to finish up his last year in the service and I was going to put him through his remaining year of college when he got out and he wanted to go to law school, and we felt like with the government allotment coming in and we had a little bit saved, that we would just more or less spend our money in some way to perpare ourselves for the future, so anyway I came back and went to law school, and I was half way through law school when he got out of the Air Force. He started to work then for an insurance company and he worked there for six months, and then another insurance company for six months and then he got this job with R. J. Reynolds Tobacco Company and that's when we moved to Hazard, Kentucky, and that is where I was in the private practice of law.

Q. 9 Did he ever at any time other than this comment about fixing you and you would never practice law again in Kentucky, or some quote like that, did he ever directly say, or admit that he had signed your name on either of the two checks or the other stuff you have produced?

A. The court costs check he did admit, yes.

Q. 10 Did you ever specifically ask him about the Fugate check?

A. No I didn't. We were separated at that time after — well actually we were — the indictments were returned in February and we separated in March, and I never did ask him specifically about that check, no.

Q. 11 Did any doctor or hospital personnel ever give you an estimate of how long the tumor had been existent?

A. They said he probably had it since [15] early childhood but had been activated within the last 2½ to 3 years.

Q. 12 I see.

A. They told me that a person suffering from this type of tumor has a complete change of personality. That they sometimes turn against the people that they love the most or their families and that they have lapses where they do things they don't remember that they have done, or what they have said, and when he came out of the surgery, you know, that I would have to be very patient with him because there was a long period of therapy connected with a condition of this type, and said that his hormones, his whole growth system in his body, they said had been greatly altered and approximately one half of his brain was not working. And they found this out you know from the EEG that they ran, and that is how they determined that I mean.

* * * * *

[20]

Q. 32 Did you ever receive any compensation fee for services rendered from Mrs. Fugate?

A. No I did not.

Q. 33 Does she still live in Perry County?

A. Yes she does and incidentally you asked me at the last hearing to furnish the court with a copy of the settlement in the cases filed, and the final settlement and its very interesting because I called the Clerk in the Perry Circuit Court and asked her to send me a photocopy of the final accounting, and she said that one had not been filed. In other words, this whole thing is still pending and open as far as the Circuit Court suit to settle the estate is concerned, either Mrs. Fugate, neither Mrs. Fugate nor Mrs. Odessa Fugate Jones have neither one made any effort to go on and settle this estate.

Q. 34 Do you recall the style of that case?

A. Mrs. Sallie Fugate vs Odessa Fugate Jones and Corbett Hogston, Surety.

Q. 35 Do you appear in the record in that action as counsel for Mrs. Fugate?

[21]

A. Yes I do.

Q. 36 Have you been discharged as counsel?

A. The day what I obtained the release from her and paid her this money I sent her a copy of my motion to withdraw as her counsel.

Q. 37 To your knowledge, was that order answered?

A. Yes.

MR. BALLANTINE: Thank you.

MR. MAYNARD: Mrs. Smith, do you know who prepared this exhibit 4?

A. The deed itself?

Q. 38 Yes ma'am.

A. No I do not.

Q. 39 Where did you get the deed from which is the photocopy that was made?

A. That is straight from the County Clerk's office, the Perry County, Earl Dean is his name, and I wrote him and asked him to send me a photocopy of the deed as entered in the record book, and he sent me that.

MR. BALLANTINE: Well then our discussion concerns the lack of an endorsement on this deed that is Exhibit 4, and on Exhibit 5, I don't see prepared by — yes, it does have prepared by, excuse me.

[22]

A. I always do every deed that way, you have to, you know, you have to sign your name on it and state who it was prepared by.

Q. 40 Do you have any idea where this Exhibit 4 was prepared?

A. No I do not. It doesn't even look like a deed, I mean, it has the habendum, you know, and the consideration, and the description but there are parts of it that don't even sound like a deed to me.

Q. 41 Have you seen the original that has Don A. Ward's signature on it?

A. Yes I have.

Q. 42 Has a signed name of Don A. Ward I mean?

A. Right.

Q. 43 Do you recognize the hand in which it is written?

A. No. It looks a great deal like Judge Ward's signature but I cannot say it is or isn't.

Q. 44 Have you ever talked to him?

A. Yes. He told me that it isn't.

Q. 45 That it is not?

A. That is not his signature, that's right.

Q. 46 Did you sign it?

A. No.

[23]

Q. 47 Is there anything else you want to say in your response to these charges or this charge, excuse me?

A. Just this, that I did not take this money from Mrs. Sallie Fugate and that I did not sign any deed with Judge Don A. Ward's name on it and I certainly did not take any deed out of the Perry County Clerk's office, and I think we got everything in we had the last time. And if you all remember anything else, please bring it to my attention because to the best of my knowledge, I have now put everything in again.

MR. BALLANTINE: I don't remember anything else, I think you covered everything.

MR. SPALDING: If you will, Mrs. Smith, if

you will look at this Exhibit 1, it has the signature of Mrs. Fugate, do you recognize that signature?

A. No I do not.

Q. 48 The Citizens State Bank at Hazard, Kentucky seems to be the bank account on which this was drawn, did you have any of Mrs. Fugate's checks in the file when you were handling the estate there towards the end, so that such a check could have been taken from your file?

A. No, no I did not.

Q. 49 Did you write the name J. Ward Smith, [24] Escrow Agent, and the amount on that check?

A. No I did not.

Q. 50 Did you have available to your husband the files in your office or at your home so that he could have known that $632.72 was to go to you for some reason?

A. I did not keep any file in my home. I think this is one thing at the last hearing. My office had been broken into one time and the files had been opened and I never suspected Jim that got into it, but some other person possibly had broken into it at one time, but I never had any checks signed by Mrs. Fugate left to me for any purpose and there was never any Escrow set up. We did discuss it and I did recommend if they wanted to we could do it this way. But she was going to Dayton, Ohio and didn't want to set it up this way. And she said that she would just go ahead and pay Odessa and I said, "All right." And

didn't even — $507.48 was the amount that she was to give her.

Q. 51 How much fee did you charge her for what you had done when you said that you had closed it out?

A. $150.

MR. BALLANTINE: Do you know where Mrs. Fugate is living now?

A. She's in Hazard.

Q. 52 Have you ever talked with her about that check?

[25]

A. No I have not.

Q. 53 That check being Exhibit #1.

A. No, no, I never have.

MR. SPALDING: Was your husband competent on August 22, 1969, to a point of where he could consider, in your opinion, which I understand is just a layman's opinion, but you did live with him, that he would know what to do to make such a check as this payable to an Escrow Agent?

A. Oh yes, yes, he was certainly capable. You mean did he have enough sense to do or to know how to do it?

Q. 54 Yes.

A. Yes.

Q. 55 Where did he get that information?

A. Jim knew a great deal about the law because

at one time he wanted to go to law school, as I told you earlier. And I'm sure I know that he has looked through all of my form books as far as that is concerned. And he would have enough knowledge to know how to put something like that together if that is what you mean. The knowledge that he absorbed, plus the fact that we went to many parties and you know how it is in law school, you discuss everything at these parties about what you have had in class and so I think he absorbed a great deal [26] of knowledge through discussions and then he would sometimes come and go to the library while I was studying and things like that, and I think he had enough knowledge of a lay nature to do something like that.

* * * * *

[27]

Q. 66 Did he know Mrs. Fugate?

A. Yes he knew Mrs. Odessa Fugate Jones, also, because when he worked for the R. J. Reynolds Tobacco Company Odessa was the display girl at Magic Market which is one of the local stores, and they worked together in setting up these things and displaying merchandise and things.

Q. 67 Now Sallie Fugate was your client?

A. Right.

[28]

Q. 68 But the administratrix of the will of the estate of Everett Lee Fugate was Odessa Fugate Jones?

A. His widow.

Q. 69 Whose widow?

A. Everett Lee Fugate's widow.

Q. 70 Oh.

A. She remarried almost immediately.

Q. 71 I see. So that Odessa Fugate Jones is Everett Lee Fugate's widow?

A. Yes.

Q. 72 And Sallie Fugate was what?

A. His mother, Everett Lee Fugate's mother.

Q. 73 I see. And the check apparently is out of the money, the money actually came from Sallie Fugate's estate?

A. Yes.

Q. 74 She, or at least Sallie Fugate's checking account?

A. Right.

Q. 75 Does the estate or the real estate purchase, Everett Lee Fugate estate, would this, as it appears on the face, indicate that $632.72 as being paid by Sallie for something out of that estate to you?

A. Well that is the way that I interpret a check like that, yes.

[29]

Q. 76 Now then if it was made payable to J. Ward Smith, as Escrow Agent, was it the contention of the court that you had taken that money instead of putting it into the estate, had cashed it, had cashed it and absconded with the money, is that the charge?

A. Yes.

Q. 77 Did Mrs. Odessa Fugate Jones or did Mrs. Sallie Fugate, either of those two, contend in any way that this property was actually transferred and that they had in fact paid money for it?

A. No.

Q. 78 Do you know?

A. No I don't believe so. Now Mrs. Fugate contended that the property was transferred to her by Odessa and the Judge approved, yes, that was contended.

Q. 79 Did she say who she paid for it, or anything of this nature, or was were you given the advantage of any of her testimony?

A. No. I did not — they impaneled the jury and there was no testimony given and the Commonwealth attorney came in there and said, "I will reduce the charge and join you with a plea for a motion to dismiss these other charges if you will enter a plea to this." And we talked it over and my attorney advised me to do it, and I agreed with him, and I don't think that there was ever [30] any testimony ever given.

Q. 80 Now at any time did your attorney or you approach Sallie Fugate and ask her if she gave that check to anyone?

A. No.

Q. 81 Did the indictment indicate that she was the one who had certainly been aggrieved, and certain-

ly lost the money, but had she made any statement or anything about it?

A. No. Odessa Fugate Jones was the one saying she had not received the money for the property that was conveyed. She was the one that went before the Grand Jury.

Q. 82 All right. Then if she went before the Grand Jury and Sallie Fugate already had the property from this other deed that you brought to us.

A. Yes.

Q. 83 Had anyone that you know of asked Sallie Fugate if she actually paid for the — that is, under the agreement to pay for it, did anyone ask her that?

A. Not to my knowledge, no.

Q. 84 Do you think that would be of any advantage to you to find out, I mean, I think we ought to be able to get that information outself if she can't [31] find out.

A. Well I have Grand Jury testimony right here (indicating), and she said she paid that money to me.

Q. 85 Mrs. Sallie Fugate?

A. Yes, paid this money to me.

Q. 86 Directly?

A. Yes sir.

Q. 87 Individually?

A. Yes, she said the check was made out to me.

Q. 88 All right. Who wrote the check?

A. She said that I did in that transcript.

Q. 89 Now I believe I asked this before, or at the other time, at the time of August 22, 1969, were you having any kind of mental problems?

A. I was upset emotionally, but no, I wasn't having any lapses of capability or anything like that.

Q. 90 You would know if you wrote the check?

A. I certainly would.

Q. 91 Would it have been so that you would have had anything in the nature of medication such as amphetamines or any alcoholic drinks that could have made [32] it so that you wouldn't know what you were doing?

A. No.

Q. 92 You have no recall at all of writing this check?

A. I did not write that check.

Q. 93 Did you know where Mrs. Fugate had her money?

A. No I didn't. For all I knew she might even not have had any.

Q. 94 Would your husband have had an opportunity to have determined that from some of his connections that you know of without guessing?

A. I just don't know, I couldn't answer a guestion like that.

MR. SPALDING: Thank you.

EXAMINATION

BY MR. MAYNARD:

Q. 95 Mrs. Smith, as far as now, is Sallie Fugate in possession of the property described in Exhibit 4 and Exhibit 5?

A. The last time that I was involved with this, yes, she was.

Q. 96 She claims that she has paid for it and therefore its her's?

[33]

A. Right. Now I'm sure on that, but at the last time, yes.

Q. 97 In Exhibit 4 and 5 it contends the contents is exactly the same, that is, in reading Exhibits 4 and 5, the contents are exactly the same up through the word, General Warranty, they're verbatim, comma for comma, and then on page 2 of Exhibit 4, there has been added the last paragraph where it states that Odessa Fugate Jones having been served with summons, et cetera, and below which is a line, and a name, Don A. Ward, Judge of the Perry Circuit Court, would you have any knowledge as to why this deed was lodged and this is Exhibit 4, was lodged twice in the office of the Perry County Court Clerk's office?

A. It disappeared the first, the first deed was taken, it was cut out of the deed book, and they called Mrs. Fugate into bring back the deed, you know, we have got to re-record it, so that is why this is the second recording of the thing.

You will note in this Grand Jury testimony of the

Clerk that recorded it said that I did not bring that, Mrs. Fugate took that deed from the Clerk's office, and had it recorded, an dsaid, that is the day the deed was removed, I had not been in that record room for probably a week or so, and she did not [34] recall me being there and I didn't have any reason to be there.

MR. BALLANTINE: Was this the only copy of the Grand Jury record?

A. No I have other copies, you can have those too.

MR. BALLANTINE: All right. We will mark this as Exhibit 6.

* * * * *

[42]

MR. SPALDING: Have you had anyone look at this for forgery as far as an expert is concerned?

A. I had Maxwell Allen look at this, $630 check to see if he could determine if that was my handwriting or not and he said he came down there to Hazard and examined it because of the quality of the [43] paper he said of the check he said that he could not testify one way or the other, and you know him, he's a a very upright person and he wouldn't testify one way or the other, he wasn't sure, that is what he said to me now.

Q. 141 It was just this that you were showing him this exhibit, that was a photocopy or the original?

A. The original of the check, and I showed him

Mr. Holland, went down to the clerk's office and got other papers that I had signed around this trying to compare all of these signatures and he said that he just was not sure.

Q. 142 Could your husband write similar to you?

A. Yes he could.

* * * * * * *

EXCERPTS FROM DEPOSITION OF MAXWELL ALLEN
February 28, 1972

* * * * *

[4]

Q. 6 Is it true that because of the quality of the papers that these documents were on, that you could not make any determination as to whether the signatures were all made by the same person?

A. No. Again my recollection, I was there in behalf of Mrs. Smith. These attorneys were defending Mrs. Smith and after, and I also examined the originals, the original documents as to be able to study the line quality and as I recall, I told this young lawyer that I would not be able to do Mrs. Smith any good after my analysis.

That I would have to make some very damaging concessions on her part and therefore I was not [5] used as a witness.

Q. 7 So you were, the fact that you were not used as a witness was not due to your inability to make an evaluation of these handwriting samples, is that correct?

A. That is my impression, correct.

Q. 8 And in your opinion were the signatures, the endorsements on the checks that you were shown, the same as the known handwriting of Mrs. Smith?

A. Purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the checks.

MR. CORYELL: I have no further questions.

* * * * * * *

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-130

JUDY WARD SMITH - - - - - - Petitioner

versus

KENTUCKY STATE BAR ASSOCIATION - Respondent

On Petition for Writ of Certiorari to the
Court of Appeals of Kentucky

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK CORYELL
306 Kentucky Home Life Building
Louisville, Kentucky 40202

LESLIE G. WHITMER, Director
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

August 24, 1973

COMMONWEALTH PRINTING CO., INC., 208 W. BROADWAY, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH - - - - *Petitioner*

v.

KENTUCKY STATE BAR ASSOCIATION - *Respondent*

On Petition for Writ of Certiorari to the Court of Appeals of Kentucky

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Kentucky Court of Appeals (App. pp. 1a-5a of Petition) is reported at 492 S. W. 2d 880.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where an attorney pleads guilty to a lesser criminal offense in a plea bargaining process and voluntarily and deliberately places in the trial record facts on

which the indictments are based, in defense to a charge based on the judgment of conviction of the lesser offense, is the petitioner deprived of due process of law when the final determiner of the facts and imposer of discipline finds the attorney guilty of committing the acts alleged in the indictments?

2. Where an attorney pleads guilty to a lesser criminal offense in a plea bargaining process than those offenses on which she is indicted and voluntarily and deliberately places the grand jury transcript concerning the indictments in the trial record in her own defense, has she waived her right to the confrontation of witnesses and cross-examination of witnesses given by a rule of the Court of Appeals, where the determiner of facts fails to find the facts in the attorney's favor?
3. Were the disciplinary proceedings by the Kentucky State Bar Association and the Court of Appeals of Kentucky conducted in such a manner as to deny petitioner procedural due process of law?
4. Does the evidence support the findings and judgment of the Court of Appeals of Kentucky?

RULES INVOLVED

Kentucky Rules of the Court of Appeals of Kentucky Concerning Procedures in Disciplinary Cases.

The pertinent provisions of Rule 3 of the Court of Appeals of Kentucky are set forth in full in the appendix of the Petition (pp. 8a-23a).

STATEMENT OF THE CASE

During February, 1970, the Perry County, Kentucky, Grand Jury returned three indictments against the petitioner-attorney, charging her with (1) obtaining money under false pretenses, (2) forgery, and (3) removal of court records concerning an estate case she was handling for one Mrs. Sally Fugate, an heir, in the Perry County, Kentucky, Circuit Court. On advice of her retained counsel and her own analysis of her situation, namely, having no evidence to present in her own defense, during a plea bargaining process, petitioner pleaded guilty to a lesser charge of attempting to commit an offense under the laws of the Commonwealth of Kentucky as provided under KRS 431.065 (Petition, p. 2).

On March 29, 1971, respondent filed a disciplinary charge against petitioner stating she had pleaded guilty to attempting to commit an offense under the laws of the Commonwealth and that such facts and actions on the part of petitioner constituted unethical and unprofessional conduct calculated to bring the bench and bar of Kentucky into disrepute for which she should be disciplined by the Court of Appeals.

Petitioner during her disciplinary hearing (two hearings were necessary because the reporter of the first hearing lost his notes) represented herself with full knowledge of the provisions of RCA 3.280 providing for the appointment of counsel where a respondent is unable to employ counsel and after the trial com-

mittee had reminded her of her right at each hearing to retain counsel together with her other constitutional rights (p. 19). She had employed counsel in her various criminal proceedings. Petitioner was successful over the objection of counsel for the bar association to place in the record her statements concerning the events and acts which led to her indictments, together with documentary evidence. In the course of her defense, petitioner voluntarily and for her own benefit entered the grand jury transcript leading to her indictments into evidence and argued the testimony of grand jury witnesses in her response to the rule to show cause issued by the Court of Appeals (p. 20). The grand jury testimony included only testimony concerning each of the aforesaid three indictments returned against her. Petitioner countered her accuser's testimony before the grand jury with an alleged possible scheme invented by her deceased husband to cause her disbarment. Petitioner at no time called any witnesses to testify at her disciplinary hearing even though she had the right to do so.

During the disciplinary proceeding, petitioner testified that she did not write the check in question and that she had employed a handwriting expert, Maxwell Allen, to examine the check. Petitioner testified at the trial hearing that Mr. Allen said he could not testify one way or the other because of the quality of the paper of the check (p. 19). After a subsequent contract with Mr. Allen, the prosecutor for the bar association discovered that Mr. Allen would testify in con-

tradiction of the statements attributed to him by the petitioner. The prosecutor notified respondent in writing of his desire to take Mr. Allen's deposition before the case was submitted to the trial committee for report informing petitioner as to the probable nature of Mr. Allen's testimony (p. 21). Petitioner agreed to the taking of the deposition and cross-examined Mr. Allen at the deposing (p. 22). Mr. Allen's sworn testimony was that petitioner was informed she had in fact written the check and he reported that he would have to make some very damaging concessions on petitioner's part (App. p. 64a of Petition). The Court of Appeals later found that petitioner had perjured her testimony at the disciplinary hearing as the result of the indicated false testimony.

The trial committee made a report to the Board of Bar Governors recommending a finding that petitioner had prepared the check, endorsed it and paid no part of the proceeds of the check to her client. The trial committee found that respondent had committed the acts leading to her indictment of obtaining money under false pretenses (App. p. 37a of Petition). In addition, the trial committee found that the facts surrounding the misdemeanor to which respondent pleaded guilty was so intertwined and such a violation of a lawyer's high ethical obligations to a client and the client's money and property that the offense clearly involved moral turpitude. The trial committee then listed the mitigating circumstances in the case which did not relate to the facts on which the indictments were based

and recommended a three-year suspension period (App. p. 39a of Petition).

The Board of Bar Governors reviewed the report of the trial committee and the transcript of evidence. On July 14, 1972, the Board entered an order finding respondent guilty as charged and *recommended* to the Court of Appeals of Kentucky that the petitioner be suspended from the practice of law for a period of six months and required to pay the costs of the action (App. p. 40a of Petition). This order was served on petitioner together with a show cause rule from the Court of Appeals.

The Court of Appeals took the case under submission after petitioner answered the rule and after the court sustained petitioner's motion permitting her to file her brief before the trial committee as her brief in the Court of Appeals (pp. 23-24). In this brief anad its attachment, petitioner argued the facts surrounding her indictments and argued vigorously that she should not be disbarred (p. 25).

The Court of Appeals as a sole finder of fact and determiner of the degree of discipline imposed on a Kentucky attorney reviewed the transcript of the disciplinary hearing. From the record built almost solely by the peitioner in her own defense, the court reviewed the evidence. As fact finders, the court found that the evidence voluntarily and deliberately placed in the record by the petitioner showed she had committed the acts leading to her indictments and had committed perjury at her disciplinary hearing. The Court of

Appeals by the weight of the evidence determined that the facts of the case proved by a preponderance of the evidence warranted disbarment (App. p. 17a of Petition). A petition for rehearing was filed by petitioner and denied without comment.

ARGUMENT

The issues raised by the petitioner in her petition for certiorari concern the manner in which a disciplinary proceeding in the Court of Appeals of Kentucky was conducted. It is argued that the manner in which the disciplinary proceeding was conducted resulted in multiple violations of petitioner's due process rights. It is contended that this court should furnish state disciplinary units with guidelines to use in disciplining their lawyers.

Each issue raised by the petitioner will be answered briefly after a short consideration of the general issues in the case at bar.

I

The Decision Below Was Based on an Adequate and Independent Non-Federal Ground

Before this court, petitioner has raised primarily three constitutional issues. First, the petitioner has asserted that she has been found guilty of charges not stated in the original charge in violation of her rights to due process. As a matter of fact, no additional charges of any kind were filed against petitioner after the original and only charge was lodged. Petitioner in her planned defense went behind the judgment re-

sulting in her pleading guilty to a lesser charge in a plea bargaining process. In an effort to explain away the acts alleged in the three indictments, she placed in the record the testimony of witnesses before the grand jury which returned the three indictments and argued her innocence of the acts. All the acts were directly related to the judgment entered on a lesser crime. The criminal offense of attempting to commit any offense under the law of the Commonwealth, if not otherwise specifically provided for (KRS 431.065), is a nondescriptive catch-all misdemeanor offense. The Court of Appeals in its disbarment opinion undertook to discuss the case law in the state of Kentucky concerning the testimony permitted where a charge is based on a judgment of conviction. In fact, the court stated:

> "Even thought we have previously held that once an attorney is adjudged guilty of a felony or a misdemeanor involving dishonesty as defined in Cotton v. Commonwealth, Ky., 454 S. W. 2d 698 the Trial Committee and Board of Governors should not consider testimony which reinquires into the issue of guilt, it has not been held that they cannot and should not examine the facts [out of which a plea of guilty is entered.] It is true that if the defendant pleads guilty to a reduced charge he cannot later insist that he was not guilty of the charge for which he was convicted. In Re Rudd, Ky., 221 S. W. 2d 688; In Re Shumate, Ky., 382 S. W. 2d 405; In Re Carroll, Ky., 406 S. W. 2d 845. However, this does not mean that the Board of Trial Committee in its investigative capacity cannot look behind a plea of guilty especially where

plea bargaining is involved in order to determine just what offenses the defendant is or was guilty of."

The court, therefore, rested its decision on the basis of their interpretation of the case law in the state of Kentucky.

The second constitutional issue raised by petitioner concerns the trial committee and the Court of Appeals of Kentucky using evidence in the form of a grand jury transcript where the evidence was placed into the record by her in her own defense. In fact, the facts surrounding the indictments were placed in the record over the express objection of respondent herein. The transcript related solely to the indictments disposed of through a plea bargaining process in the resulting judgment on which the sole disciplinary charge is based. It is contended that the court violated its own rule (RCA 3.360) against admitting such evidence.

On petition for rehearing, respondent herein argued that petitioner voluntarily wavied her right to confrontation and cross-examination of witnesses before the grand jury whose testimony appeared in the transcript. In support of this argument, the case of *Bonar* v. *Commonwealth,* 180 Ky. 338, 202 S. W. 676, 677 (1918), was cited to the court. The Court of Appeals of Kentucky in that case stated:

". . . This alleged vice, as will be seen, consisted in the way and manner in which the facts were developed before the jury. The means by which a tribunal obtains possession of the facts

> when they are contested in the trial of a case is called in the law testimony. For the better protection of litigants, and to avoid impositions being practiced upon the courts, certain rules for the admission of testimony have been prescribed by the law. These rules affording such protection to the litigants may be waived by them, and testimony may be heard contrary to such prescribed rules. If this be done, either by the consent of the litigant or without his objection thereto properly manifested at the time of its introduction, he will be deemed to have waived his right to insist upon a strict enforcement of such rules, and this doctrine of waiver applies also to a defendant in a criminal prosecution, although he may be guaranteed the constitutional right to have the testimony introduced and heard contrary to the way he consented."

The *Bonar* opinion cites the leading United States Supreme Court case on right of waiver of constitutional rights styled, *Diaz* v. *United States,* 223 U. S. 442, 56 L. Ed. 500 (1911). It is clear from the provisions of RCA 3.280 and 3.360 the Kentucky Court of Appeals recognizes and protects the constitutional rights of a respondent discussed by this court in *In Re Ruffalo,* 390 U. S. 544 (1968), and related cases. Such rights are a personal privilege and were expressly waived by petitioner under Kentucky case law. The Court of Appeals of Kentucky in denying petitioner's petition for rehearing without comment has based its decision on independent and substantial non-federal grounds. It will be noted that the state disbarment in the *Ruffalo* case was not before this court. In the state disciplinary

case, this court denied a petition for certiorari. *Ruffalo* v. *Mahoning County Bar Ass'n.*, 379 U. S. 931, 13 L. Ed. 2d 342 (1964).

Regarding the finding of facts and imposing of discipline, the Court of Appeals of Kentucky has clearly defined the duties of trial committees, the Board of Bar Governors and the court. In *Kentucky State Bar Association* v. *Stivers*, 375 S. W. 2d 900, 903, 904 (1972), the Court stated:

> "In any event, the report and recommendations of the trial committee are only advisory to the Board of Governors, as are the Board's recommendations to this court. RCA 3.400, 3.420 (now RCA 3.360, 3.370). This means, of course, that in the end this court must be judge of the factual as well as the legal issues and of the final action to be taken. The role of fact-finder is neither welcome nor comfortable to an appellate court, but obviously we have saddled it upon ourselves by our own rules for this type of proceeding."
>
> * * * * * * *
>
> "In a matter as serious as this the advisory weight of the Board's action can be little more than hortatory, which means in simple English that the members of this court are going to exercise their own judgment anyway."

It is clear that the court did exercise its own judgment by the fact it refused to follow the recommendations of the trial committee or the Board of Bar Governors.

Thirdly, petitioner contends the court's show cause order required her to show cause why she should not be suspended for six months and then the court entered an order disbarring her. It is argued such a procedure is inconsistent with due process. Petitioner was, as a matter of fact, fully aware of the advisory nature of the recommendations made by the trial committees and the Board of Bar Governors. RCA 3.380 provides that the report of a trial committee is advisory. RCA 3.390 provides that any order of the Board recommending to the court that disciplinary action be taken is advisory. In fact, the Board's order served on the petitioner together with the rule to show cause is clearly labeled "Recommendation." Petitioner's brief and attachment thereto in response to the rule to show cause states that unless a misdemeanor is done with deliberate and conscious intent, it seems that such offense should not be grounds for disbarment. Petitioner knew at all stages of the proceeding that regardless of the recommendations of the trial committee and the Board of Bar Governors, she could be disbarred by the Court of Appeals of Kentucky.

The constitutional issues raised by petitioner were answered by the court through the interpretation of Kentucky law and the Rules of the Court of Appeals of Kentucky. There was no federal issue to be decided since the sole basis on which to determine the validity of the petitioner's constitutional argument rested on the proper interpretation of Kentucky law.

The petitioner has requested this court to grant a petition for certiorari, and yet a close examination of the issues involved and a careful reading of the opinion rendered by the Court of Appeals reveals that the results reached in this case by the Court of Appeals were based upon a clear and careful analysis of Kentucky substantive law, the Rules of the Court of Appeals and the record in the case as a whole. Certiorari certainly should not be granted merely to review the findings of fact made independently by the Court of Appeals sitting as a fact finder.

II

The Decision Below is Correct and There Are no Justiciable Reasons for Granting the Writ

The Court of Appeals reviewed the facts surrounding the three offenses on which petitioner was indicted to determine the acts, if any, which lead to the plea of guilty to a lesser crime. From the evidence petitioner submitted in her own defense, the court, as the sole finder of fact, determined on a review of the entire record that petitioner had committed acts amounting to the crimes described in her indictment. The court found the facts had been proven by the evidence in the record. The court did not consider other criminal charges brought against petitioner and mentioned in the petitioner's testimony which were not interwoven with her plea of guilty. At every stage of the disciplinary proceeding petitioner argued the facts surrounding her indictments open and freely to explain

her innocence. She now seeks to plan another theory of defense when the final determination of facts was not in her favor.

Petitioner seeks to move this court to set uniform rules for state disciplinary proceedings and cites the American Bar Association's Report on Disciplinary Enforcement (1970) authored by retired Supreme Court Justice Tom C. Clark. A comparison of the model rules for state disciplinary agencies when they were released and Rule 3 of the Court of Appeals in effect at that time, will show that Kentucky had the model structure almost without exception. Amendments to Rule 3 effective July 2, 1971, brought Kentucky in nearly complete compliance with the model including a revision of the rule relating to procedure where an attorney has been convicted of a serious misdemeanor or felony. The new Rule (RCA 3.320) abolishes the old rule under which the case at bar was prosecuted (RCA 3.330). The new rule in line with the recommendations of the Clark report eliminates the vague phrase "offense involving moral turpitude" substituting "serious misdemeanor and felony" for which disbarment is the punishment and provides for a period of suspension when the judgment of conviction is appealed to a higher court. The impact of the Clark report has been felt in every state. There has been a restructuring of disciplinary machinery in most states. Effective guidelines insuring due process in disciplinary proceedings are in existence and proving extremely effective. Action by this court in this area is not needed. State action has proved effective.

It is abundantly clear that petitioner was not found guilty of acts which were not alleged in the original charge. The finding of the Court of Appeals of Kentucky were entirely consistent with and interwoven with the provisions of the charge with the exception of the finding that petitioner had given false testimony at the disciplinary trial hearing. The record before the court clearly supported the court's finding in this respect. It is not believed that this court wishes to venture on a fact-finding mission, therefore, the petition should be denied.

In the case of *Kentucky Bar Association* v. *John David Martin,* 490 S. W. 2d 759 (1973), the Court of Appeals of Kentucky disbarred Mr. Martin when he plead guilty to the criminal offenses of displaying stolen license plates and defrauding an innkeeper by known inability to pay his hotel bill. The punishment of disbarment in petitioner's case is not unreasonable. In the case of *Kentucky State Bar Association* v. *Jansen,* 459 S. W. 2d 141 (1970), the respondent was disbarred for accepting a fee and rendering no service therefor. The punishment is sound and in the public interest. The degree of punishment is clearly in the discretion of the highest state court in Kentucky and not subject to review by this court on a writ of certiorari.

The action of the Court of Appeals of Kentucky was completely consistent with the court's holding in *In Re Ruffalo,* 390 U. S. 544, 88 S. Ct. 1222 (1968). Petitioner was afforded due process as provided in the *Ruffalo* case. In the *Ruffalo* case during the third

day of hearings the Board added a new charge against the respondent over the strong objection of his counsel based on facts completely unrelated to the original charge. This fact situation is not found in the case at bar. No additional charges were leveled against petitioner. The evidence petitioner most strenuously argues should not have been considered by the Court of Appeals of Kentucky was voluntarily and deliberately placed in the transcript of hearing by the petitioner herself.

Petitioner would have this court sit as a fact finder. It is urged that this court review the evidence presented at the disciplinary trial hearing and decide whether or not from certain evidence the petitioner prepared and endorsed the check in question. This fact-finding task is a burden placed on the Court of Appeals of Kentucky by its own rules and does not involve a federal issue to be decided by this court. As a matter of case law in Kentucky, petitioner waived her right to confrontation and cross-examination of the witnesses appearing before the grand jury which indicted her on behavior which would support a finding of three criminal acts in a state criminal proceeding. Petitioner introduced and entered into evidence the testimony of the witnesses.

Petitioner argues that the Court of Appeals of Kentucky has not followed its own rule prohibiting the consideration of a transcript of a grand jury proceeding. The danger here, petitioner states, is where the agency that must decide whether to follow the rule is also the

agency that determines guilt and recommends punishment. The petitioner waived her right to avail herself of the rule of the court which could prevent the review of the transcript of the grand jury proceeding. Petitioner took the risk of placing adverse testimony in the record hoping to overcome the testimony by her own self-serving statements. Her defense failed and she now seeks to relitigate her case on factual issues in this court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari be denied.

Respectfully submitted,

FRANK CORYELL
306 Kentucky Home Life Building
Louisville, Kentucky 40202

LESLIE G. WHITMER, Director
Kentucky Bar Association
243 State Capitol Building
Frankfort, Kentucky 40601

Counsel for Respondent

August 24, 1973

APPENDIX

EXCERPTS FROM DEPOSITION OF PETITIONER OCTOBER 8, 1971

* * * * * * *

[3] Mr. Ballantine: I must confess that I don't remember everything that we talked about before, Mrs. Smith, but I do remember and want to reiterate that because these proceedings do relate criminal proceedings, you, of course, would have a right to remain silent and you have got a right under the rules of the Court of Appeals and the by-laws of the Bar Association to have counsel and you have a right to call witnesses, and we are in a pre-trial conference with an effort to try to facilitate the actual proceedings and you have a right to remain silent if you choose to, and as an attorney, of course, you're of your constitutional rights, and anything that you do say, we will be able to consider either for or against you, if you do choose to discuss the matter with us. And I think you understand all of that, do you not?

[4] The Witness: Yes I do.

* * * * * * *

[42] Mr. Spalding: Have you had anyone look at this for forgery as far as an expert is concerned?

A. I had Maxwell Allen look at this, $630 check to see if he could determine if that was my handwriting or not and he said he came down there to Hazard and examined it because of the quality of the [43] paper he said of the check he said that he could not testify one way or the other, and you know him, he's a very upright person and he wouldn't testify one way or the other, he wasn't sure, that is what he said to me now.

EXCERPTS FROM BRIEF OF PETITIONER MARCH 11, 1972

[8] Coupled with the medical condition of Respondent's late husband were the facts that he had access to Respondent's office and that he had acquired enough passable legal knowledge to be able to simulate or copy certain legal transactions, such as filling out a deed form. In addition, he was acquainted with the Administratrix of said estate and had worked with her in setting up displays for his employer, R. J. Reynolds Tobacco Company. Throughout the testimony of Mrs. Sallie Fugate before the Grand Jury, she constantly refers to "they", and Respondent surmises that this may have been her late husband and the Administratrix. If "they" could stage a wrongful taking of money on respondent's part, which would subject her to criminal indictment, and, likewise, if "they" could cast suspicion on Mrs. Fugate as to filing a fraudulent deed for recording and then removing same from the deed book, then respite against both parties could be achieved by this transaction. Testimony before the Grand Jury indicates that it was Mrs. Jones, the Administratrix, who discovered that the deed was missing (Grand Jury Record, page 23, Question 1 and Answer), and the Clerk does not recall Respondent being in the Record room around the time the deed was taken (Grand Jury Record, page 42). Respondent could be a victim of said transaction as much as Mrs. Fugate.

[LETTERHEAD OF FRANK CORYELL]

November 18, 1971
Judith Ward Smith, Esquire
Attorney at Law
611 Highland Drive
Bowling Green, Kentucky

In Re: Kentucky Bar Association v. Smith

Dear Mrs. Smith:

In view of the fact that Mr. Maxwell Allen was named by you as examining the checks material to the action in which you entered a Plea, it is my feeling that it will be helpful to the Trial Committee to know exactly what his examination did or did not show.

Therefore, I am again requesting your authorization to take Mr. Allen's deposition. To be very honest with you, I feel that Mr. Allen's testimony will be contrary to that given by you before the Trial Committee. If you feel you should not so authorize Mr. Allen I will pursue the enclosed request to the Trial Committee to direct Mr. Allen to do so.

Respectfully,

FRANK CORYELL
FC:ft
Enclosure

cc: Durward Maynard
Chairman of Trial Committee
601 Louisville Trust Bldg.
Louisville, Kentucky

611 Highland Drive
Bowling Green, Kentucky
November 29, 1971

Hon. Frank Coryell
Attorney at Law
305 Kentucky Home Life Building
239 S. Fifth Street
Louisville, Kentucky 40202

Dear Mr. Coryell:

In light of your letter and its innuendo, I consent to the taking of Mr. Allen's testimony by deposition. I would appreciate it if the deposition is set sometime after January 1st, if this is convenient with you.

Very truly yours,

/s/ JUDITH W. SMITH
Judith Ward Smith

JWS
cc: Hon. Durward W. Maynard

COURT OF APPEALS OF KENTUCKY

KENTUCKY STATE BAR ASSOCIATION - - *Complainant*

v.

JUDY WARD SMITH - - - - - - - *Respondent*

MOTION

Comes now the Respondent, Judy Ward Smith, and moves the Court to accept herein the Brief she filed before the Trial Committee on March 11, 1972, as her Reply to the Brief filed by counsel for Complainant on September 18, 1972.

In support of said Motion, Respondent states that she can add nothing further to the contentions advanced in the Brief described above, except to distinguish by attachment hereby filed with this Motion, the case of *Kentucky State Bar Association* v. *Lester*, 437 S. W. 2d 958 (1968), cited by Complainant in said Brief, from the case at bar; that, due to lack of funds, Respondent is unable to file a Reply Brief before this Court at this time.

In the event that the Court should sustain Respondent's Motion, Respondent asks that the Court note one correction to said Brief. On Page 5 of said Brief, filed on March 11, 1972, the reference to RCA 3.230 should be corrected to RCA 3.190.

WHEREFORE, in order to represent Respondent's interests fairly before the Court, she petitions the Court to sustain this Motion.

(s) Judy Ward Smith
Respondent
7671 Juliette Low Drive
Huntington Beach, California 92647

Dated: November 16, 1972

EXCERPT FROM ATTACHMENT TO THE BRIEF IN COURT OF APPEALS

Second, Respondent believes that *Kentucky State Bar Association* v. *Lester, supra,* page 960, is distinguishable because the Bar Association:

> ". . . did *not* undertake its disciplinary proceeding *on the basis of conviction of crime,* but upon the *basis of such gross unprofessional conduct* as demonstrated the respondent's lack of integrity and moral character requisite for his continuing as a practicing Kentucky lawyer." (Emphasis Added.)

It would seem that the Committee applies a similar but significantly different test to misdemeanor convictions. The reason for bringing such a Kentucky practitioner before a Trial Committee must be greater than conviction of a misdemeanor itself. The attorney must manifest his unfitness to practice law by gross misconduct. In other words, conviction of a misdeanor [sic] by itself is not enough to warrant discipline. Unless the misdemeanor is done with deliberate and conscious intent, it seems reasonable that such offense should not be grounds for disbarment as in the *Lester* instance.

The inquiry must be: did Respondent deliberately act to cause the commission of the charged offense? Respondent has acted in every way she possibly could conceive to establish the lack of fraudulent intent on her part. (See Page 5 and Page 12 of Respondent's Brief, filed on March 11, 1972.)

Respectfully Submitted,
(s) Judy Ward Smith
Respondent
7671 Juliette Low Drive
Huntington Beach, California 92647

Dated: Nov. 16, 1972

OCT 1 1973

MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-189

JUDY WARD SMITH ..... Petitioner

VS.

KENTUCKY STATE
BAR ASSOCIATION ..... Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

REPLY TO BRIEF IN OPPOSITION

Robert Allen Sedler

Box 862
University Station
Lexington, Kentucky 40506

Attorney for Petitioner

PROFESSIONAL PRINTING CO., 1113 Commercial Dr., Lexington, Ky. 40505 - 252-8602

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PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF KENTUCKY

REPLY TO BRIEF IN OPPOSITION

ARGUMENT

1. The petitioner has contended that the holding of the Kentucky Court of Appeals to the effect that it can disbar an attorney by finding the attorney guilty of acts that were not included in the original charge and

as to which she had no notice that she would be charged, is clearly inconsistent with this Court's decision in *In re Ruffalo*, 490 U.S. 544 (1968). The Bar Association responds to this contention by claiming that the finding of the Court of Appeals that the petitioner was guilty of "multiple offenses" was "entirely consistent with and interwoven with the provisions of the charge with the exception of the finding that petitioner had given false testimony at the disciplinary trial hearing" (Brief in Opposition, p. 15), and distinguishes *Ruffalo* on the ground that in the case at bar no additional charges were leveled against the petitioner by the Bar Association. But it is precisely because the charges were not added by the Bar Association that the petitioner did not have even a belated chance to rebut them. The petitioner was charged by the Bar Association only with having engaged in unethical and unprofessional conduct by pleading guilty to the charge of an attempt to commit an offense, which the Bar Association describes as a "nondescriptive catch-all misdemeanor offense." (Brief in Opposition, p. 8). She was not charged with having obtained money under false pretenses or with forgery or with removal of court records, and she was not put on notice that if the Trial Committee or the Court of Appeals disbelieved her testimony she would be charged with perjury.

Before the Trial Committee the petitioner contended that she did not commit any offense, but pleaded guilty on the advice of counsel and on her own assessment of her chances of prevailing before the jury. The Trial Committee went behind the plea of guilty, as it had the power to do, "in order to determine just what offenses the [petition-

er] is or was guilty of," 492 S.W.2d at 882, but it limited its inquiry entirely to the question of whether the petitioner prepared and cashed Sally Fugate's check in the amount of $632.72. There was no consideration by the Trial Committee at all as to whether the petitioner was the person who forged the Circuit Judge's signature on the deed or who took the deed from the Clerk's office, and there was no evidence whatsoever, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with either of these transactions. The Court of Appeals, however, found that the petitioner had committed "multiple offenses" and in addition had committed perjury, 492 S.W.2d at 882, thereby concluding that she was also guilty of forgery and removal of court records, the other offenses originally charged in the indictments. Not only was the petitioner in no way put on notice that she might be found guilty of these two offenses, not only did the Trial Committee not make any findings with respect to these offenses, but there is a total absence of evidence in the record that would support a finding of guilty as to these offenses, making such a finding a clear violation of due process of law. *Thompson* v. *City of Louisville*, 362 U.S. 199 (1960); *Garner* v. *Louisiana*, 368 U.S. 248 (1961); *Gregory* v. *City of Chicago*, 394 U.S. 111 (1969).

The Bar Association does not dispute the fact that at no time was the petitioner put on notice that she could be charged with perjury if the Trial Committee or the Court of Appeals disbelieved her version of the events. Interestingly enough, the Bar Association takes the position that perjury of which the petitioner was found guilty related

to her testimony as to what a handwriting expert, Maxwell Allen, told her lawyer. (Brief in Opposition, p. 5). She testified that she was told by her lawyer that Mr. Allen said he could not testify one way or the other as to whether the signature on the check was that of the petitioner. Mr. Allen's testimony before the Trial Committee was that "he would have to make some very damaging concessions" and that "the purported signatures of, and handwriting of Mrs. Smith at that time compared favorably with that on the checks." (App. p. 64a of Petition). In the view of the Bar Association this was the basis of the perjury charge.

The petitioner's assumption was that the purported perjury related to her entire defense — that she did not prepare and cash the check in question — rather than to the inconsistency between her version of what Mr. Allen had told her lawyer and his testimony before the Trial Committee. The petitioner's interpretation of the charge against her would appear to be borne out by the statements of the Court of Appeals to the effect that, "Her contentions are refuted by the sworn testimony of a large number of witnesses," 492 S.W.2d at 881, and "Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent [petitioner herein] has committed perjury in her attempt to extricate herself from these charges." 492 S.W.2d at 882. The evident confusion as to what was the basis of the charge of perjury demonstrates quite clearly why an attorney must have notice that such a charge will be leveled against her and must know the precise nature of the charge.

If the Bar Association's view as to what was the basis of the perjury charge is correct, the petitioner was specifically prejudiced by the failure to give notice in that she did not have the opportunity to show that she could have been mistaken about what Mr. Allen had said and did not deliberately testify falsely. Mr. Allen did not talk to the petitioner directly but to her attorneys, (App. p. 64a of Petition), and it is certainly possible that she either misunderstood their version of what Mr. Allen had said or that they relayed this information to her incorrectly. In order for the offense of perjury to be committed the testimony must be "absolute and false and made with wiltul intent." *Commonwealth* v. *Maynard*, 91 Ky. 131, 15 S.W. 52 (1891).[1] If the petitioner had been given notice that she would be charged with perjury in connection with this transaction, she could have shown the circumstances in which the information was relayed to her and could have demonstrated the absence of wilful intent.

On the other hand, if the basis of the perjury charge was the petitioner's testimony in support of her contention

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[1]In *Johnson* v. *Featherstone*, 141 Ky. 793, 133 S.W. 753, 754 (1911), the Court stated:

"The crime of perjury or false swearing involes a wilful, corrupt misstatement of a fact in that the witness wilfully testifies to a fact as true which he knows to be untrue.... In nearly every disputed case somebody is mistaken, misconceives, or misrecollects. Innocent mistakes in evidence are not criminal, and constitute neither perjury or false swearing. See also *Booth* v. *Commonwealth*, Ky., 419 S.W.2d 739 (1967).

that she did not execute and cash the check in question, the specific prejudice by the absence of notice of the charge may be even more significant. The petitioner was at no time put on notice that if she attempted to go behind the plea of guilty she could be "by her own testimony, irrevocably assuring her disbarment under charges not yet made." *In re Ruffalo, supra*, 390 U.S. at 551. The petitioner was representing herself and could not help but realize that her explanation of what had occurred would appear, to say the least, "unusual."[2] If she had known that she would face a charge of perjury and the penalty of disbarment if the Trial Committee disbelieved her testimony, she might well have chosen to "take her chances" with the plea on its face. How she would have proceeded if she had been specifically informed of what she was facing, "no one knows." *In re Ruffalo, supra*, 390 U.S. at 544.[3]

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[2]On the other hand, it may be queried, what motivation there would be for an attorney to jeopardize her career and risk possible imprisonment in order to obtain $632.72. The absence of such motivation would lend credence to the petitioner's version of the events, but this does not appear to have been considered by either the Trial Committee or the Court of Appeals.

[3]The Court of Appeals attempted to butress its conclusion that the petitioner had committed perjury by stating, "An examination of the writings by this court when compared with the known writing of respondent [petitioner herein] reveals without question that she prepared the documents. Therefore, in addition to the crimes already committed, an examination of this record shows conclusively that respondent [petitioner herein] has committed perjury in her attempt to extricate herself from these charges." 492 S.W.2d at 882. In the proceedings

(Continued on Page 7)

The petitioner was charged only with having pleaded guilty to an attempt to commit an offense, and the Trial Committee went behind her plea, as it had the power to do, solely for the purpose of determining whether she prepared and cashed a check of Sally Fugate in the amount of $632.72. She was not charged before the Trial Committee with having committed "multiple offenses," there was no issue in those proceedings with respect to her having forged the Circuit Judge's signature on a deed or having removed court records, and there is not a shred of evidence in the record, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with those transactions. The Court of Appeals, however, found that she had committed "multiple offenses" and that she was also guilty of perjury.

In *In re Ruffalo, supra*, this Court stated: "The absence of fair notice as to the reach of the grievance pro-

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(Continued from Page 6)

before the Trial Committee the petitioner produced a check with the signature admittedly signed in her name by her late husband. It was her theory that her husband, who had on other occasions signed her name on checks, signed her name on the Sally Fugate check. The Court of Appeals did not compare her husband's signature of the petitioner's name with the signature on the Sally Fugate check, and if it had, it might have not been so positive that the signature on the Fugate check was actually that of the petitioner. If the petitioner had been specifically charged with perjury and given an opportunity to defend the charge, she doubtless would have insisted that this comparison be made, and if it had been the Court of Appeals might have found she was innocent of the false pretenses charge as well.

cedure and the precise nature of the charges deprived petitioner of procedural due process." 390 U.S. at 551-2. It is equally clear that the present petitioner did not have "fair notice as to the reach of the grievance procedure and the precise nature of the charges," and she too has been deprived of due process of law. The holding of the Court of Appeals of Kentucky to the contrary flies in the face of this Court's decision in *In re Ruffalo, supra*, clearly justifying the grant of certiorari by this Court.

2. The Bar Association does not dispute the petitioner's contention that the use of grand jury testimony to resolve a crucial issue of credibility against an attorney in bar disciplinary proceedings raises a substantial constitutional question. Nor does it deny that the use of such testimony in the case at bar was in flat violation of the Rules of the Court of Appeals of Kentucky applicable to bar disciplinary proceedings. Instead it argues that the petitioner "waived" her right to confrontation and cross-examination of the witnesses whose testimony appeared in the grand jury transcript and her right to insist on compliance with the Court rules by "voluntarily" introducing the transcript into evidence. Ignoring the fact that there was no discussion of "waiver" by the Court of Appeals in its opinion, the Bar Association assumes that the Court of Appeals found that a "waiver" had occurred and contends that whether federal constitutional rights can be waived is a matter of state law, so that a finding of waiver by the state court conclusively precludes review of the petitioner's constitutional contentions by this Court. This Court, of course, has held exactly to the contrary, *Henry v. Mississippi*, 379 U.S. 443 (1965), and even if the state

court had found that a "waiver" had occurred, this would not preclude consideration of the petitioner's constitutional contentions by this Court.

In any event, the contention that the petitioner could have "waived" her right to confrontation and cross-examination in the case at bar or her right to insist on compliance with the Court rules is clearly misplaced. The Bar Association states, "In the course of her defense, petitioner voluntarily and for her own benefit entered the grand jury testimony leading to her indictments into evidence." (Brief in Opposition, p. 4).[4] This is simply not what happened. The petitioner testified at length before the Trial Committee as to her view of what had occurred (Petition for Certiorari, pp. 6-7), and then candidly informed the Trial Committee that Mrs. Fugate had testified before the Grand

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[4]The Bar Association also notes that the petitioner relied on the grand jury testimony in her response to the rule to show cause issued by the Court of Appeals and says that, "The grand jury testimony included only testimony concerning each of the aforesaid three indictments." (Brief in Opposition, p. 4). In point of fact, there was no testimony in the transcript that remotely connected the petitioner with either forging the Circuit Judge's signature on the deed or with removing the deed from the Clerk's office. The testimony to which the petitioner referred in her response was related to her suggestion that her husband and Odessa Fugate Jones may have been acting together to injure both the petitioner and Sally Fugate, and consisted of the testimony of the Clerk to the effect that Mrs. Jones was the person who discovered the missing deed and that the Clerk did not recall the petitioner's being in the record room during the time when the deed was presumably taken. (App. p. 20 of Brief in Opposition).

Jury that the petitioner was the person who had prepared the check in question. Far from being for the petitioner's benefit, the testimony could serve only to implicate her, but she felt that she was required to call this to the attention of the Trial Committee.[5] The Committee made clear its desire to have the transcript introduced into evidence, and the petitioner agreed. But so far as she knew, it would only be introduced for the purpose of confirming that Sally Fugate had made such a statement before the grand jury. She had no reason to believe at this point in time that the Trial Committee was doubting her veracity, and she certainly had no way of knowing that the Trial Committee would consider the grand jury testimony as substantive evidence, in violation of the Court rules. Nor could she have known that the Court of Appeals, again in violation of its own rules, would treat the transcript

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[5]Mrs. Fugate did not testify before the grand jury that she had ever discussed this matter with the petitioner or demanded that the petitioner explain why the proceeds had not been turned over to Mrs. Jones. The failure of Mrs. Fugate even to contact the petitioner in regard to the transaction casts serious doubt on her statement that the petitioner was the person who had prepared the check. It is far more likely that the check was prepared by the petitioner's late husband, who represented to Mrs. Fugate that he was doing so on instructions from the petitioner, and that when Mrs. Fugate and her daughter were called before the grand jury, they were reluctant to disclose this fact, since the petitioner's husband was not an attorney. If the Trial Committee had called Sally Fugate as a witness, all of these questions could have been fully clarified. Instead it chose to rely on the grand jury transcript, in violation of the Court rules, to resolve this crucial question adversely to the petitioner.

as substantive evidence that refuted the petitioner's testimony before the Trial Committee and showed that she was guilty of perjury. The petitioner was entitled to assume that the grand jury transcript was being introduced only so that the Trial Committee could confirm that Sally Fugate had given testimony adverse to the petitioner before the grand jury. If the Trial Committee then doubted the veracity of the petitioner, it was incumbent on them to call Sally Fugate as a witness so that they could question her and so that the petitioner could confront and cross-examine her. In no sense could the petitioner be deemed to have "waived" her right of confrontation and cross-examination and her right to insist on compliance with the Court rules by introducing the transcript for this limited purpose. The contention that by turning over the grand jury transcript to the Trial Committee the petitioner "waived" her rights of cross-examination and confrontation and her right to insist on compliance with the Court rules is simply incredible.

A substantial question is presented in the case at bar as to whether in bar disciplinary proceedings grand jury testimony can be relied on to resolve a crucial issue of credibility against the attorney and to support a finding that the attorney was guilty of perjury. That issue cannot be avoided by claiming that, on the facts of this case, the petitioner somehow "waived" her

rights by introducing the transcript for a limited purpose at the Trial Committee's request.[6]

3. The receipt of the grand jury transcript as substantive evidence and its consideration by the Trial Committee, as well as by the Court of Appeals, was in flat violation of the Court rules applicable to bar disciplinary proceedings. Although the petitioner was not put on notice that the transcript would be considered as substantive evidence, it is true that she turned it over to the Trial Committee. This being so, a question is necessarily presented as to whether the due process requirement that bar authorities and the courts follow their own rules in bar disciplinary proceedings is somehow vitiated if the attorney does not expressly object when there is the possibility that a departure from the rules may occur. It is submitted that, as a minimum, there can be no "waiver" of the right to insist on compliance with the rules, unless the attorney is first specifically informed that a departure from the rules is contemplated and given an opportunity to object. She should not, as here, have to speculate that her act of turning over the grand jury transcript for a limited

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[6]The Trial Committee indicated its desire to see the transcript at the first hearing (two hearings were necessary because the reporter of the first hearing lost his stenographic notes) and asked the petitioner if she had a copy. She replied that she had a copy, but did not have it with her at that time. She brought a copy of the transcript with her at the second hearing and gave it to the Trial Committee. The Trial Committee, of course, could have obtained a copy independently, whether the petitioner objected or not.

purpose will be construed as constituting a "waiver" of her right to insist that it not be considered as substantive evidence against her. The petitioner would go further, however, and contend that the bar authorities should not be permitted to put an attorney in a position where she must choose between insisting on compliance with the rules (even if she had been made aware that a departure from the rules was contemplated) and incurring the displeasure of the agency that determines guilt and recommends punishment by her insistence. This Court should grant certiorari to determine whether in bar disciplinary proceedings the bar authorities and the courts must comply with their own rules or whether they can disregard these rules when they find it convenient to do so and then claim that the attorney has "waived" her rights by not objecting.[7]

4. Finally, the Bar Association attempts to completely confuse the issues presented in this case by arguing that, "Petitioner would have this court sit as a fact finder," and that [she urges] "that this Court review the evidence presented at the disciplinary trial hearing and decide whether or not from certain evidence the petitioner prepared and endorsed the check in question." (Brief in Opposition, p. 16). In no sense has the petitioner asked this Court to "sit as a fact

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[7]If the petitioner had attempted to introduce the grand jury testimony as substantive evidence in the hopes of strengthening her case, a different question would be presented, *i.e.*, can the bar authorities permit the attorney to "waive" a rule purportedly enacted for her protection.

finder." What she has contended in this respect is that her rights of confrontation and cross-examination and her right to insist on compliance with the Court rules were violated when the Trial Committee found that the petitioner prepared and endorsed the Sally Fugate check on the basis of testimony contained in a grand jury proceeding. Likewise, she is not asking this Court to review any factual findings relating to the forgery of the Circuit Judge's signature on a deed or to the removal of the deed from the Clerk's office, because no such findings were made by the Trial Committee, and there is no evidence in the record, even in the transcript of the grand jury proceedings, that remotely connected the petitioner with either of these events. Nor is she asking this Court to review the finding of the Court of Appeals that she was guilty of perjury. What she contends in this respect is that she was entitled to notice that such a charge was going to be made and to some opportunity to defend against it. The petitioner has alleged serious violations of her constitutional rights in the proceedings before the Trial Committee and the Court of Appeals, but by no stretch of the imagination has she asked this Court to "sit as a fact finder." By resorting to such an absurd argument in opposition to the Petition the Bar Association has tacitly conceded the constitutional questions raised by the petitioner. These questions are indeed substantial and are of fundamental importance to the legal profession and the public whom it serves. Certiorari should be granted by this Court to resolve them.

CONCLUSION

For the reasons stated herein, and for the reasons set forth in the Petition for Certiorari, the Petition should be granted.

Respectfully submitted,

ROBERT ALLEN SEDLER
Box 862
University Station
Lexington, Kentucky 40506

Attorney for Petitioner